

**BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
100 Maryland Avenue, Room 200
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:
KENSINGTON HEIGHTS 2, LLC
Applicant

Christopher McGoff
Sterling Mehring
Alfred S. Blumberg
Curt Schreffler
Michael Lenhart
For the Application

Steven A. Robins, Esquire
Martin J. Hutt, Esquire
Attorneys for the Applicant

Zoning Application No. G-877

Donna Savage, individually and on behalf of the
Kensington Heights Citizens Association
Karen Cordry, Molly Brunjes, Aaron Garnett and
Jerome Mortman
Community Participants Not in Opposition¹

Khalid Afzal, M-NCPPC
Renée Miller, M-NCPPC
Government Witnesses

Martin Klauber, Esquire
Peoples Counsel
Not in Opposition to the Application

Virginia Sheard
Community Participant in Opposition

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER’S REPORT AND RECOMMENDATION

¹ These community participants initially opposed the rezoning, but after various concessions by the Applicant, they now do not oppose the rezoning application.

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I. EXECUTIVE SUMMARY

Applicant:	Kensington Heights 2, LLC
LMA No. & Date of Filing:	G-877, filed June 20, 2008
Zoning and Use Sought:	Zone: RT-8 Use: 24 Townhouses (including 4 MPDUs) and 3 single-family, detached homes
Current Zone and Use:	Zone: R-60 and C-T; Current Use: Undeveloped
Location:	West University Boulevard and Findley Road (Outlot B), Kensington
Applicable Master Plan:	<i>1990 Wheaton Central Business District and Vicinity Sector Plan</i>
Acreage to be Rezoned:	3.0157144 acres (131,364.52 sq. ft.) ²
Right-of-Way to be dedicated:	None required at present, but that will be determined at Subdivision
Density Permitted in RT-8 Zone:	8 du/acre, but up to 9.76 du/acre, per Zoning Ordinance §59-C-1.74, when MPDUs are provided as prescribed in Code § 25A-5(c)).
Density Planned:	8.94 per acre (<i>i.e.</i> , 27 Dwelling Units on 3.02 acres)
Bldg. Coverage Allowed/Planned:	40% Maximum per §59-C-1.74 / 25% planned
Green Space Required/Planned:	45% Minimum per §59-C-1.74 / 55% planned
Parking Spaces Required/Planned:	54 required (2 spaces per unit) / 70 planned
Building Height Limits:	35 feet maximum allowed / 35 feet maximum planned
Environmental Issues:	The Site is not in a Special Protection Area. Technical Staff recommended submission of a forest conservation plan and a noise analysis at subdivision.
Consistency with Master Plan:	Project does not comport with the RT-6 and CT recommendation of the Sector Plan, but is consistent with its purpose and objectives.
Neighborhood Response:	Some community concerns, including pre-hearing letters in opposition regarding compatibility and possible traffic issues. There was also a failed effort of some neighbors to have the site designated for "Legacy Open Space." However, all but one of the opposition witnesses withdrew their opposition at the hearing. The Kensington Heights Citizens Association now supports the plan.
Technical Staff Recommends:	Approval
Planning Board Recommends:	On a 2-1 vote, recommended denial to await Sector Plan update
Hearing Examiner Recommends:	Approval

² The Hearing Examiner notes that there are inconsistencies in the square footage listed as the area to be rezoned in a number of Applicant's documents. The original application (Exhibit 1) lists two area figures, 131,859 square feet and 131,364.52 square feet. The second figure, 131,364.52 square feet, is correct, as indicated by the Metes and Bounds description certified by the surveyor (Exhibit 92(h)). The first figure (131,859 square feet) was an error which was unfortunately carried forward to the amended application (Exhibit 43(a)). *See Applicant's explanation in Exhibit 95.* To rectify this problem, Applicant filed a corrected amended application (Exhibit 96), which lists the area to be rezoned as 131,364.52 square feet, and a correspondingly corrected SDP (Exhibit 95(a)). The other discrepancies are minor differences resulting from rounding, which yielded the figure of 131,363 square feet listed in Applicant's Land use Report (Exhibit 47) and the Technical Staff report. The Hearing Examiner considers these discrepancies to be immaterial since the area sought to be rezoned has not actually been enlarged, and Applicant submitted corrected documents. *See Zoning Ordinance §59-H-2.24.*

II. STATEMENT OF THE CASE

Application No. G-877, as amended by Applicant Kensington Heights 2, LLC,³ requests reclassification of Outlot “B,” Kensington Heights, from the existing R-60 and C-T Zones to the RT-8 Zone. The property consists of 3.0157144 acres of unimproved land (131,364.52 square feet) located at West University Boulevard and Findley Road, in Kensington, Maryland.

The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits binding limitations with respect to land use, density and development standards or staging. Applicant proposes to build a development that consists of twenty-four new townhomes, including four moderately priced dwelling units (MPDUs), and three single-family detached homes. The proposal is set forth in a revised Schematic Development Plan (SDP), Exhibit 95(a), which contains an illustrative diagram and a specification of the binding elements, as well as other information regarding the development.

The application initially had requested rezoning to the RT-10 Zone, with a plan to build 36 townhouses (Exhibit 1), but the Montgomery County Planning Board (“Planning Board”) voted on November 13, 2008, to deny the application at that density (Exhibit 40). Thereafter, on March 19, 2009, Applicant amended its application to request rezoning to the RT-8 Zone, with 24 townhouses and 3 single-family detached homes. *See* Exhibit 43(a), later corrected in Exhibit 96.

Following the amendment of the application, letters were received in support of the application (Exhibits 55 and 61) and in opposition (Exhibits 49, 52, 53, 54 and 81). The pre-hearing opposition, led by the Kensington Heights Citizens Association (Exhibit 49), raised four concerns – sector plan compliance, compatibility, traffic and stormwater management. One opponent wanted the site “to remain in its current, unbuilt state” (Exhibit 52); however pre-hearing efforts to have this property designated for “Legacy Open Space” failed. Exhibit 58.p. 9. Support for the application, including an

³ The application was filed on June 18, 2008, and amended on March 19, 2009 (Exhibit 43(a)). A corrected version of the amended application, with an accurate acreage description, was filed on October 13, 2009 (Exhibit 96). *See footnote 2.*

endorsement by the “Action Committee for Transit” (Exhibit 55), was based on the fact that the proposed development is an excellent example of “smart growth.”

Technical Staff of the Maryland-National Capital Park and Planning Commission (“M-NCPPC”), reviewed the revised plans, and in a report dated July 6, 2009, recommended approval (Exhibit 58).⁴ The Planning Board considered the revised application on July 16, 2009, and by a vote of 2 to 1, recommended disapproval, as set forth in a memorandum dated July 17, 2009 (Exhibit 60). Although the Planning Board recognized that “the amended application presented an improved design,” the voting majority felt that any reclassification differing from the current 1990 Wheaton Central Business District and Vicinity Sector Plan should await completion of a sector plan update. The update process is in its beginning stages, as it is now being formulated by Technical Staff.

A public hearing was duly noticed and convened on July 31, 2009, at which time the Applicant presented evidence and testimony in support of the application. Martin Klauber, the People’s Counsel, participated in the hearing, but he did not call any witnesses. Two members of Technical Staff, Khalid Afzal and Renée Miller, testified at the request of the parties. A number of community witnesses, including the Kensington Heights Citizens Association, appeared at the hearing. Although all were initially opposed to the application, this situation changed dramatically after the first day of the hearing. When the hearing resumed on August 19, 2009, the parties announced that an agreement had been reached between the Applicant and the community, and all but Virginia Sheard withdrew their opposition to the application. 8/19/09 Tr. 5-7 and Exhibit 88.⁵

After the hearing was completed on August 19, 2009, the record was held open for additional filings by the Applicant (until September 4); for responses thereto by Technical Staff and interested parties (until September 14); and for responses by Applicant (until September 18). This schedule was adhered to, and the record closed, as scheduled, on September 18, 2009. However, it had to be

⁴ The Technical Staff Report is quoted and paraphrased frequently herein.

⁵ There were two hearing dates. The transcript from the first is denoted “7/31/09 Tr. xx” and the second, “8/19/09 Tr. xx.”

reopened and closed again on October 15, 2009, to receive a corrected application (Exhibit 96), a corrected final SDP (Exhibit 95(a)) and corrected executed covenants (Exhibit 95(b)). The corrected filings rectified a disparity in the listed area to be rezoned, which had resulted from arithmetic errors.

After a careful review of the entire record, the Hearing Examiner finds that Applicant's proposal meets the standards for reclassification of the subject site to the RT-8 Zone, and in fact, the planned development will be compatible with the community and in the public interest. The Hearing Examiner further finds that, despite the Planning Board's 2-to-1 vote to do so, it would be inappropriate to wait for approximately two years while a review of the current Sector Plan is completed and revisions are possibly made regarding the subject site. This issue is discussed in Part III. G. of this report regarding the sector plan.

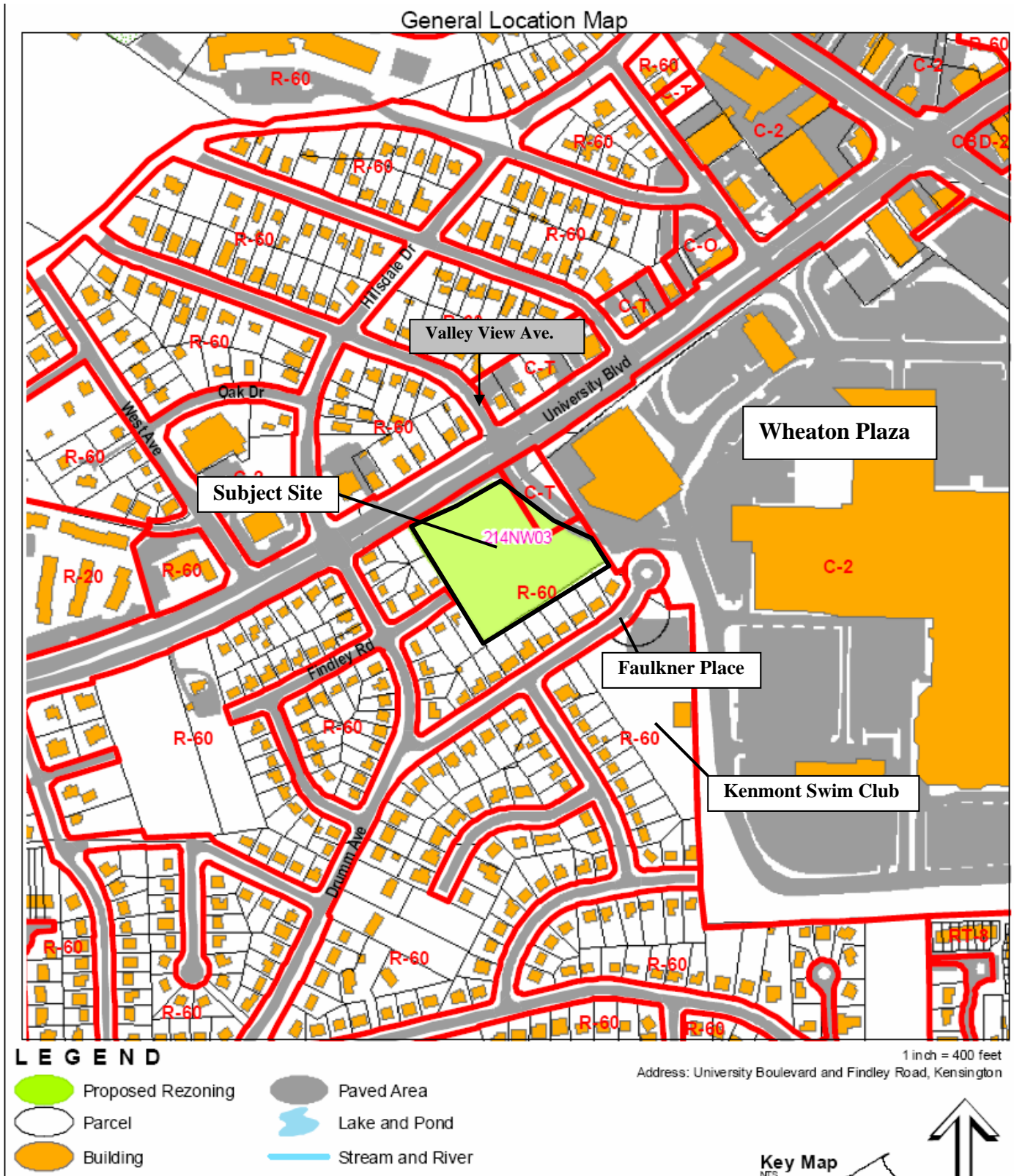
III. FINDINGS OF FACT

A. Subject Property

The subject property (Outlot B), which has an area of about 131,364.52 square feet (3.0157144 acres), is located just west of Westfield Wheaton Mall (commonly known as "Wheaton Plaza"), at the southwest corner of Valley View Avenue and University Boulevard West. Its relationship to Wheaton Plaza is shown below on the certified Plat Map (Ex. 8):



A broader view of the area immediately around the subject site is displayed in the General Location Map appended as Attachment 1 to the Technical Staff report (Exhibit 58):



The Applicant provided an aerial view in its Land Use Report (Exhibit 47(a), p. 11), and Staff provided two other photos of the undeveloped subject site, shown below (Exhibit 58, Attachment 2):

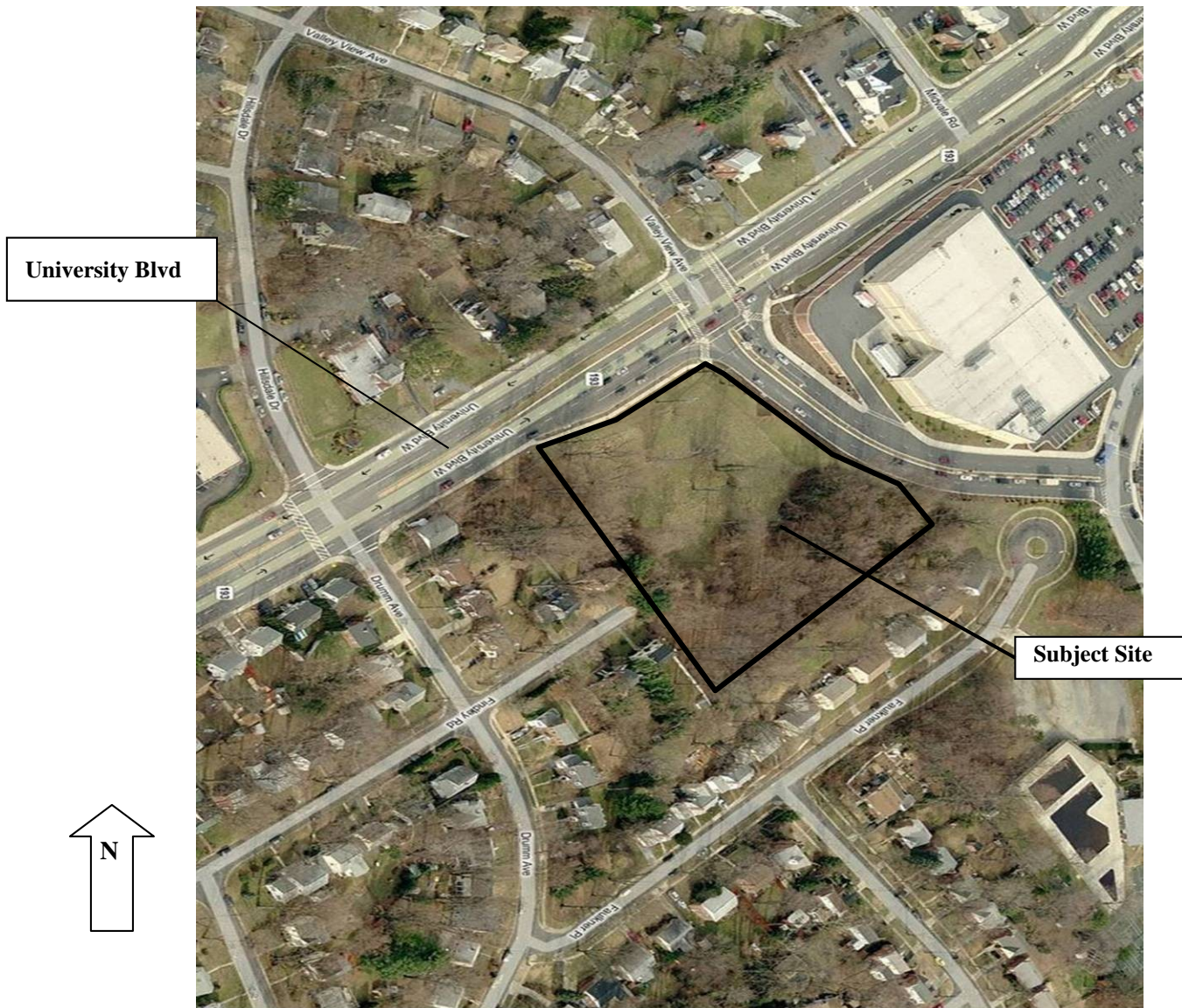
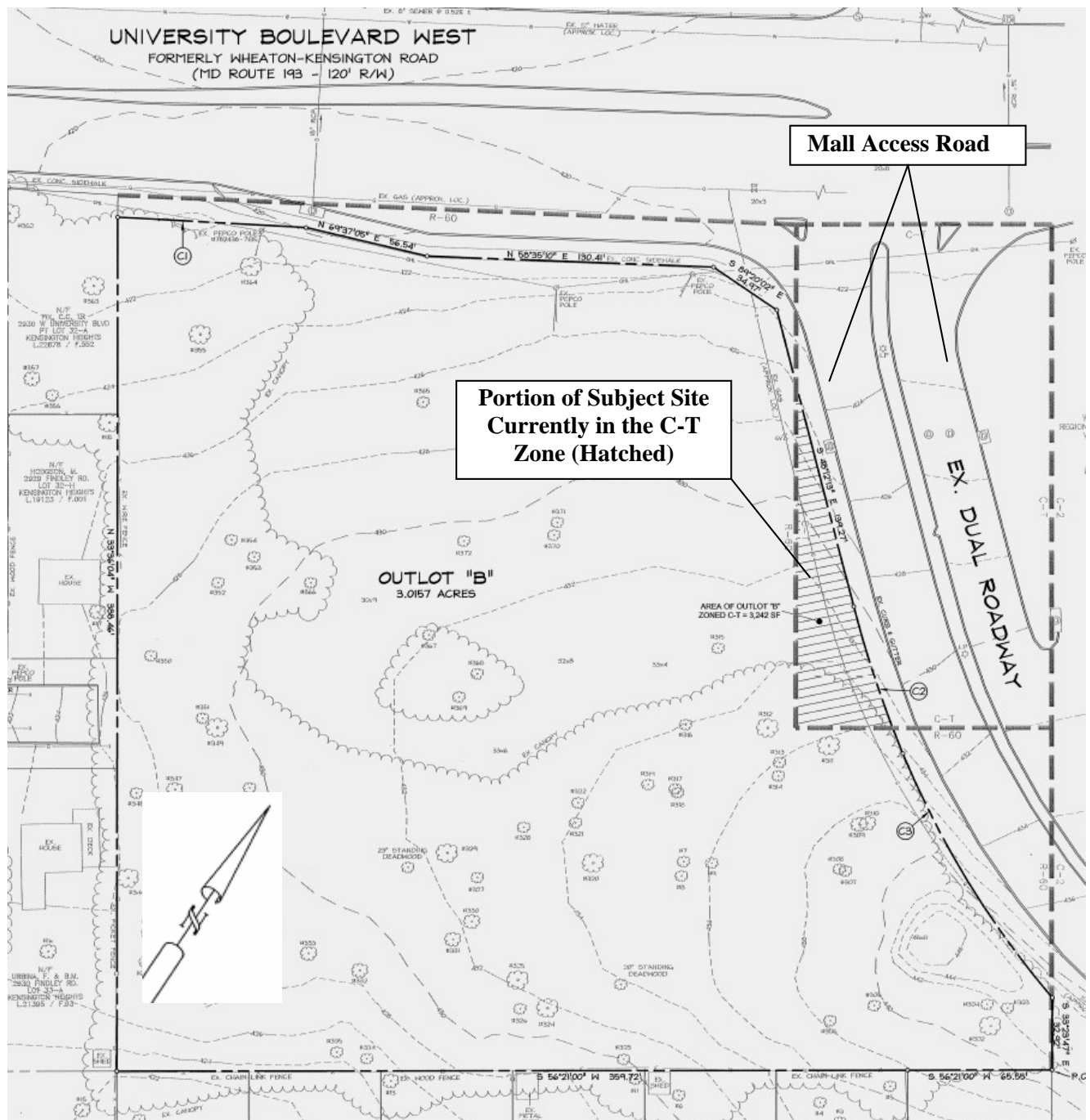


Figure 1: Across University Blvd (looking towards subject site)



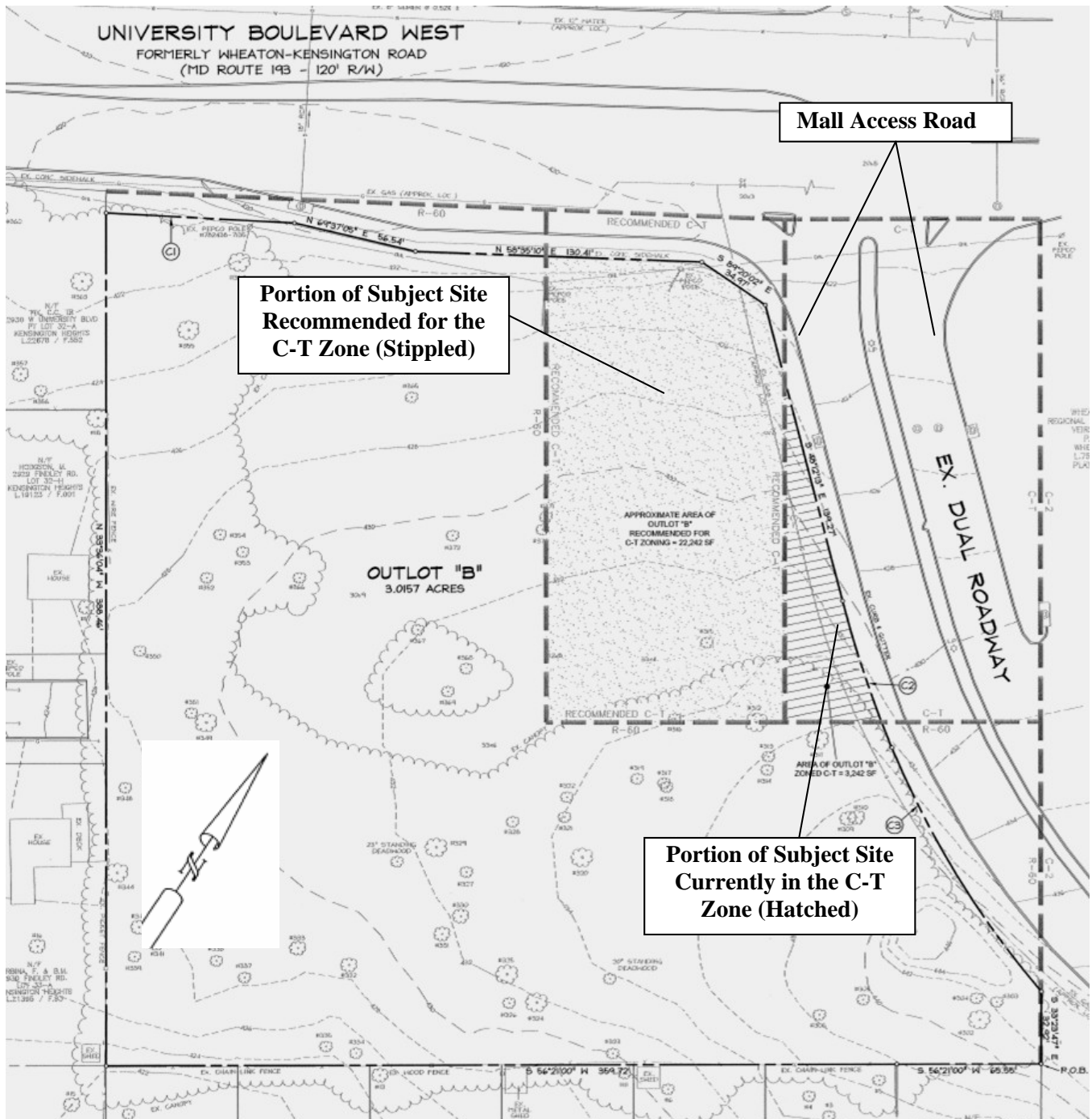
Figure 2: Site @ service road (University Blvd to right)

Vehicular access to this site is via Findley Road, an existing 50-foot right-of-way, which terminates at the western boundary of the property, as can be seen on the general location map reproduced on page 7 of this report. That same map shows that the vast majority of the subject site is in the R-60 Zone, with only a small sliver (3,242 square feet) on the northeastern border in the C-T Zone. The rest of the existing C-T Zone, adjacent to Outlot B, is used as a service road that accesses Wheaton Plaza. These features can be more clearly viewed on the following Plat Map (Exhibit 75):



The applicable Sector Plan, which will be discussed in Part III. G. of this report, calls for a somewhat larger portion of the subject site (*i.e.*, Outlot B) to be classified in the C-T Zone, as shown in the following annotated Plat Map (Exhibit 76). The remainder is recommended for the RT-6 Zone.

7/31/09 Tr. 311-312.



According to Technical Staff (Exhibit 58, p.2), the site is generally higher in elevation than most of the surrounding development. The lowest elevation is along University Boulevard and at the University Boulevard intersection with a service road into Wheaton Plaza. The site increases in elevation from these two points towards the southeast corner of the property, nearest the cul-de-sac of Faulkner Place, which is at the highest elevation.

There is a stand of trees in the southern portion of the property, which contains 1.02 acres of forest. According to Environmental Planning Division (Exhibit 58, Attachment 11), that forest constitutes the largest remaining forested area within the Wheaton CBD Sector Plan area, and it is designated with a moderate priority for retention. The remainder of the site is an open grassy field.

There are also no streams, wetlands, floodplains or associated buffers on the site, and the property is not within a Special Protection Area or a Primary Management Area. There are no steep slopes or highly erodible soils on site. Exhibit 58, Attachment 11. The site is currently unimproved and vacant. Exhibit 47(a), p. 5.

The site does not have direct vehicular access to University Boulevard, but it accessed by Findley Road, and Findley Road connects west of the site with Drumm Avenue, which intersects with University Boulevard. The subject site is within half a mile (about 2,300 feet) of the Wheaton Metro Station (“as the crow flies”), and about 3.078 feet walking distance from the Metro station. It is also served by both Metrobus and RideOn bus routes. Pedestrian access will be provided by lead-in sidewalks to the site. The adjacent service road for Wheaton Plaza intersects with University Boulevard, which is a six-lane divided highway, with left turn storage lanes. University Boulevard (MD Route 193) has a 120-foot right-of-way, and is a major highway.

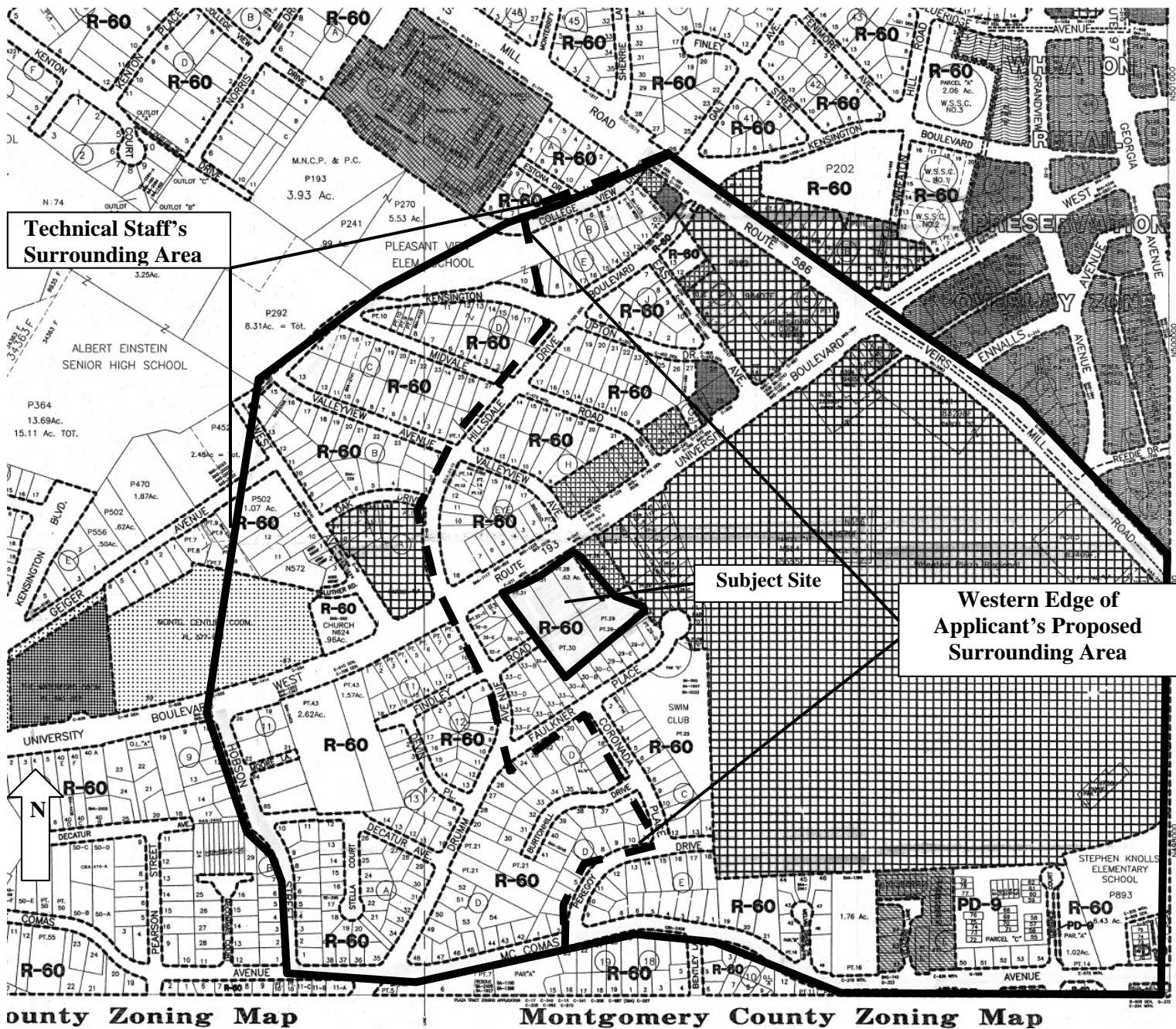
Various witnesses for Applicant testified that they had walked to the Metro from the site, along two different routes in from 10 to 15 minutes. 7/31/09 Tr. 62-63 and 183; 8/19/09 Tr. 105-106. This easy walking distance is shown on the map on the following page (Exhibit 71(a)):



B. Surrounding Area

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development.

Technical Staff proposed to define the surrounding area as bordered by College View Drive to the north, Veirs Mill Road to the east, McComas Avenue to the south, and Hobson Street to the west. Exhibit 58, p. 2. It is depicted by a solid line on the Zoning Map, Exhibit 67, reproduced on the next page. Applicant’s land planner, Al Blumberg, proposed to define the surrounding area more narrowly on the western border than did Technical Staff. His surrounding area would stop at Drumm Avenue and Hillsdale Drive, which is the western edge of the Sector Plan area, and it is depicted by a dashed line on the following Zoning Map.



Thus, Staff's definition would extend the surrounding area another 1,000 feet or so to the west, out to Hobson Street. Mr. Blumberg admitted that the proposed development might have impacts, visual and otherwise, extending beyond his proposed surrounding area, and he indicated he could live with Technical Staff's definition. 7/31/09 Tr. 136-138.

Even though there is a certain logic to stopping the surrounding area definition at the edge of

the sector plan area, the Hearing Examiner believes that such a definition would put the western border too close to the subject site, and therefore not account for potential impacts. As a result, the Hearing Examiner accepts Technical Staff's surrounding area definition. Technical Staff describes land use in the surrounding area as follows (Exhibit 58, pp. 2-3):

Important nearby land uses near the site include the Giant Grocery Store at Wheaton Plaza, zoned C-2, and the Kensington Heights and the Kensington View neighborhoods, zoned R-60. There are also several small businesses zoned C-T and C-2 located near the site. The surrounding area is characterized by one-family detached and multi-family housing, and several non-residential uses, including professional offices and service-related retail. There are also several special exceptions in the area that were mostly approved in the 1970s and 1980s.

Table 1: Land use and Zoning

	Immediately adjacent to site		Area Surrounding the site	
Direction	Zoning Designation	Existing Use	Zoning Designation	Existing Use
North	N/A R-60	University Boulevard Kensington View Subdivision	C-2 R-60 and R-20	Office Building Single- and Multiple-Family Residential
South	R-60	Kensington Heights Subdivision	R-60	Single-Family Residential
East	C-2	Giant Food Store	C-2, C-T ¹ CBD-2	Mixed Use, including Retail, Multiple-Family and Office
West	R-60	Kensington Heights Subdivision	R-10 R-60	Single- and Multiple-Family Residential

Table 2, below, identifies each of the special exceptions within the surrounding area.

Table 2: Special Exceptions

Case No.	Address	Zone	Use	Approved
CBA-565	2900 Faulkner Pl	R-60	Private Club (Swim & Tennis)	10/28/1957
CBA-565-A	2900 Faulkner Pl	R-60	Private Club (Swim & Tennis)	Not available
CBA-3063	11190 Veirs Mill Rd	C-2	Drive-In Restaurant	10/19/1971
S-242	2813 W. University Blvd	C-T	Non-Resident Medical Office	09/19/1973

Case No.	Address	Zone	Use	Approved
S-262	3101 W. University Blvd	R-60	Private Educational Institution	08/22/1973
S-394	11194 Veirs Mill Rd	C-2	Auto Filing Station	04/23/1975
S-459	10914 Georgia Ave	R-60	Private Educational Institution	03/24/1975
S-694	10900 Georgia Ave	R-60	Housing for Elderly or Handicapped person	08/16/1979
S-742	2609 McComas Rd	R-60/RT-8	Housing for Elderly or Handicapped person	03/05/1980 (denied)
S-854	2809 W. University Blvd	C-T	Home Occupation- Tailoring	12/08/1982
S-892				
S-1203	3114 W. University Blvd	R-60	Housing for Elderly or Handicapped persons	07/26/1985
S-1228	2921 W. University Blvd	R-60	Accessory Apartment	12/29/1987
S-1509	2741 W. University Blvd	C-2	Drive-In Restaurant	04/01/1998
S-1695	11201 Upton Dr	R-60	Off-street parking related to a commercial use	08/24/1984
S-2038	2917 W. University Blvd	R-60	Non-Resident Medical Office	02/23/2001 (revoked)
S-2245	2915 W. University Blvd	R-60	Major Home Occupation	02/07/1997 (denied)
S-2664	11030 Veirs Mill Rd	C-2	Drive-In Restaurant	06/01/2007

Wheaton Plaza, now Westfield Shopping Mall or Wheaton Mall, which is adjacent to the subject site along part of its eastern border, has at least 1.25 million square feet of retail space. There are also some out-parcels and some office buildings, primarily along Veirs Mill Road, which are often seen as part of Wheaton Mall, making it over two million square feet in total. Aside from Wheaton Mall, its access road to the east and University Boulevard to the north, the adjacent and confronting properties are single-family, detached homes in the R-60 Zone; however, the confronting homes on the north side of University Boulevard have numerous special exceptions for nonresidential uses along that block. The Kenmont Swimming Club is on the south side of Faulkner Place, one block south of the subject property. 7/31/09 Tr. 129-133.

Technical Staff also provided some photographs of the surrounding area taken from the subject site (Exhibit 58, Attachment 2:2). They are reproduced on the next page.



Figure 3: Looking towards University Blvd (from site)



Figure 4: Looking east towards Giant and service road



Figure 5: Looking east (site to right) along University Blvd



Figure 6: Faulkner Pl cul-de-saq (highest point of site is beyond the trees)



Figure 7: Looking west (Findley Rd)

C. Zoning History

The subject property was classified under the R-60 Zone in the 1958 Countywide Comprehensive Zoning. Technical Staff reports that subsequently, two unsuccessful rezoning applications were filed, F-971, which was withdrawn in 1975; and G-547, which was withdrawn in 1987.⁶ Both cases proposed to change the site's zoning classification from the R-60 zone to the C-2 zone, but due to inadequate public facilities at the time of the zoning requests, the cases were withdrawn. Exhibit 58, p. 4. In 1989, a small portion of the site (3,242 square feet along the eastern side) was rezoned to C-T in LMA G-594. The remainder of the site continued in the R-60 Zone, which is its existing classification. In 1990, most of the R-60 part of the subject site was designated by the Wheaton Central Business District and Vicinity Sector Plan as suitable for the RT-6 Zone. The remaining 22,242 square feet of site, some of which is already in the C-T Zone, was designated by the Sector Plan as suitable for the C-T Zone, as depicted on page 10 of this report.

D. Proposed Development

The Applicant proposes to construct twenty-four, three-story townhouse units, including four MPDUs, and three detached, single-family units, on the 3.02 acre site. Applicant's vision for the project was discussed by its two partners who testified, Sterling Mehring and Chris McGoff. Mr. Mehring described the proposed development as a bridge between the community and the good services that are nearby, as well as a buffer for the existing community. He envisioned an architectural streetscape along University Boulevard and up the access road into Westfield Mall that would provide a formidable transition into more protected and less dense property behind it. 7/31/09 Tr. 105-120.

Chris McGoff suggested that this site presents an extremely rare opportunity for smart growth because of its proximity to Metro, shopping and major roadways, and "this is an absolute smart growth project." 7/31/09 Tr. 61. Mr. McGoff testified that he and his family walked the neighborhood at a

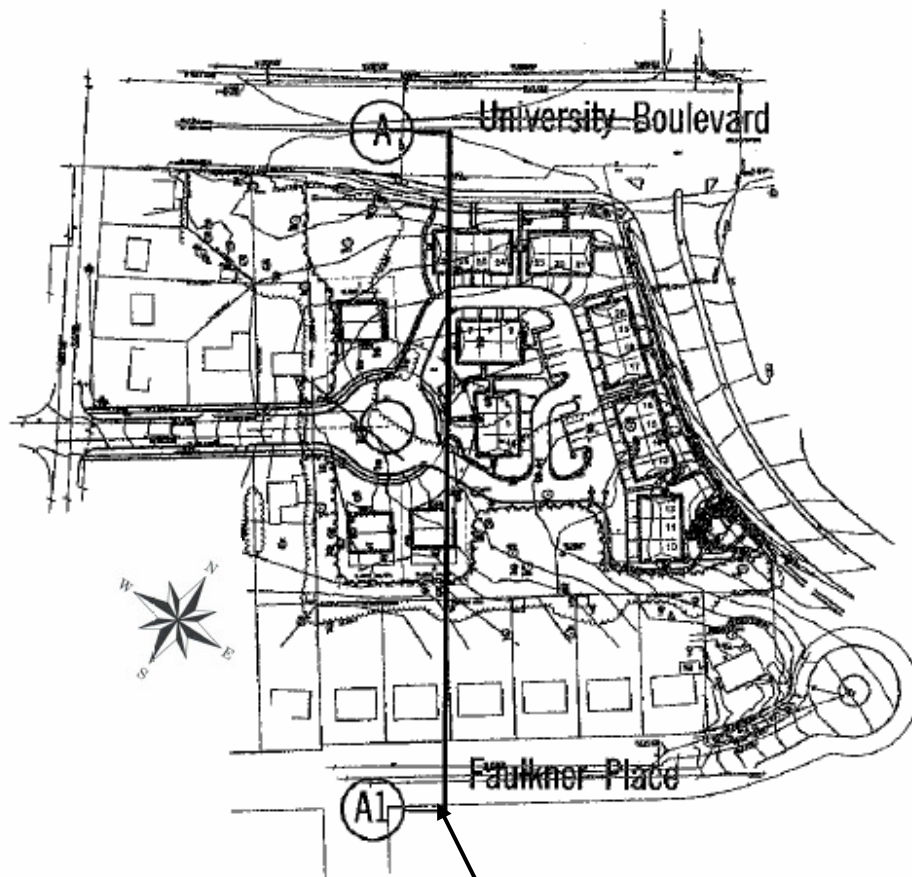
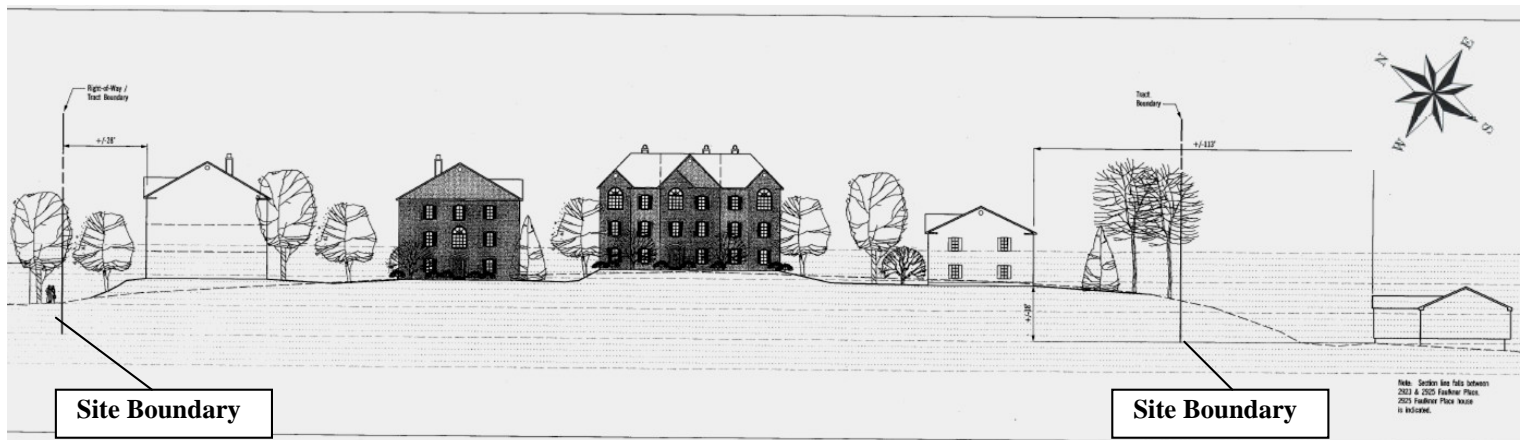
⁶ There was a typographical error in the Staff Report, which erroneously refers to G-547 as "G-541."

slow pace and found many services within a short distance of the subject site, as shown in Exhibit 64(b). Examples are 4 minutes to a pool and to a supermarket, 10 minutes to Wheaton Plaza and 14 minutes to Metro. 7/31/09 Tr. 62-63. If you are driving, its only 450 feet from the site to the nearest big road, University Boulevard, as shown in Exhibit 64(c). 7/31/09 Tr. 67.

Mr. McGoff also noted that the proposed townhouses would serve as a transition for the existing neighborhood, and would be “a wonderful little community compatible with its surroundings.” 7/31/09 Tr. 53. A sense of Applicant’s vision can be seen in diagrammatic portion of the rendered schematic development plan (Exhibit 70), reproduced below:



The following cross-section (Exhibit 69), which cuts essentially from north to south through the center of the site, also gives a perspective of the proposed development:



Cross - Section Location

The proposed density of the development is 8.94 dwelling units per acre. The RT-8 Zone allows a density of 8 units per acre, but that density may be increased when MPDUs provided on site. Zoning Ordinance §59-C-1.74 permits a density of up to 9.76 du/acre, depending on the number of MPDUs provided, as prescribed in Montgomery County Code § 25A-5(c)). To achieve a density bonus allowing up to a density of 8.94 du/acre, Applicant must provide 13.7% of the dwelling units as MPDUs (*i.e.*, more than the 12.5% minimum). Providing 13.7% MPDUs would allow up to a 12% bonus density, pursuant to Code § 25A-5(c), which amounts to a permitted density of up to 8.96 dwelling units per acre (*i.e.*, 8 du/acre +12% bonus = 8.96 du/acre). Since Applicant's proposal calls for a density of 8.94 du/acre (*i.e.*, less than 8.96 du/acre)⁷, it is sufficient for Applicant to provide 13.7% MPDUs. On a 27 dwelling unit project, 13.7% MPDUs amounts to a minimum of 4 MPDUs, which is what Applicant plans to provide. The final number of MPDUs and bonus density will be determined at Subdivision.

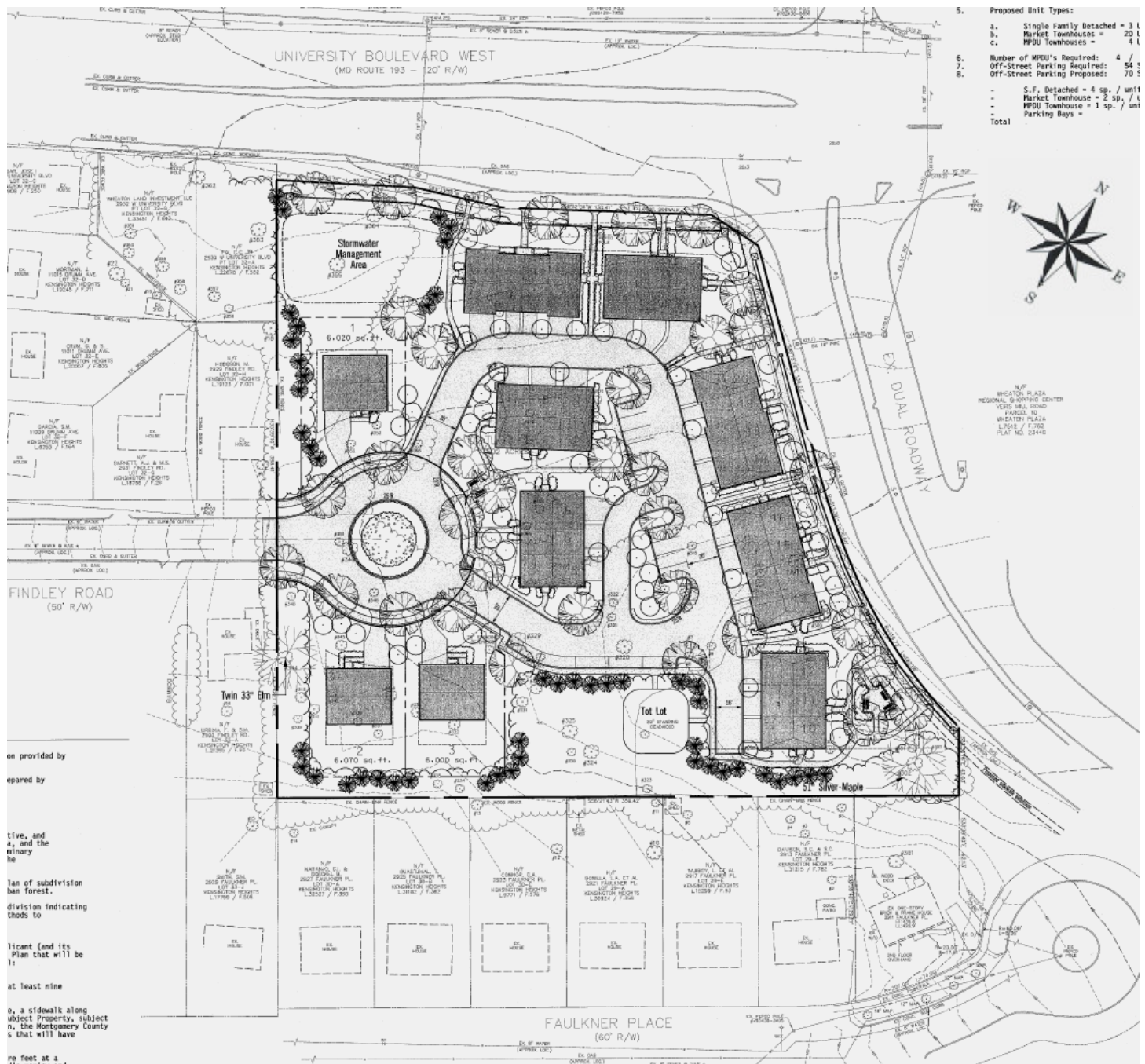
E. Schematic Development Plan and Binding Elements

Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the “optional method” of application. The optional method requires submission of a schematic development plan that specifies which elements of the plan are illustrative and which are binding, *i.e.*, elements to which the Applicant consents to be legally bound. Those elements designated by the Applicant as binding must be set forth in a Declaration of Covenants to be filed in the county land records if rezoning is approved. The Applicant has filed the required Declaration of Covenants in the record of this case as Exhibit 95(b).

The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to

⁷ The 8.94 du/acre figure is derived from dividing the number of proposed dwelling units (27) by the number of acres on the site, rounded to two decimal places (3.02 acres). When the more precise acreage figure of 3.0157144 acres is divided into the number of units (27), the result is a density of 8.953 du/acre, which is still within the 8.96 du/acre density which can be achieved with a 12% bonus density.

specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a schematic development plan amendment. The graphic portion of the revised SDP (Exhibit 95(a)), is illustrative (except as specified in the binding elements), and it is reproduced below.



The plan shows three single-family detached homes located adjacent to the single-family, detached homes in the existing neighborhood to the west and south of the site. The closest existing home will be 40 feet from the nearest proposed single family, detached home, and 112 feet from the nearest row of proposed townhouse, as shown in Exhibit 68(d). Applicant proposes seven rows (or sticks) of townhouses, none of which exceed four units. Rows of four units and three units face University Boulevard and the Wheaton Mall access. The two internal townhouse rows contain only three units each. The MPDUs will be located among the townhouse units.

The layout of the development and limits on the townhouse units are spelled out in the seven binding elements contained in both the SDP (Exhibit 95(a)) and in the covenants (Exhibit 95(b)):

BINDING ELEMENTS

1. The maximum number of dwelling units shall be 27 including moderately priced dwelling units (MPDU's). The final number of dwelling units including a minimum 12.5% MPDU's will be established at site plan review.
2. Any units that have lot frontage and direct access on the proposed cul-de-sac and are contiguous to the existing R-60 neighborhood (or are separated from that neighborhood only by a common area) shall be one-family detached homes.
3. The maximum number of units in a townhouse row shall not exceed four units except for any townhouse units facing the proposed Findley Road cul-de-sac, which must not exceed three units per row. Likewise, any townhouse units directly confronting the common property line with houses that front on Faulkner Place must not exceed three units per row. If townhouse rows are located around the Findley Road cul-de-sac or confront the common property line with houses that front on Faulkner Place, these particular units shall be designed to have the appearance of one-family dwelling units with one front door per elevation. The final design, layout and location will be established during site plan review.
4. The one-family detached units identified on the Schematic Development Plan as Units 1, 2 and 3 shall be set back a minimum distance from the common property line as follows:

Unit 1:	25 feet (side)
Unit 2:	30 feet (side) and 35 feet (rear)
Unit 3:	35 feet (rear)
5. Vehicular access to this site shall be limited to Findley Road.
6. Building coverage shall not exceed 25% of the gross tract area.
7. Green area provided shall not be less than 55% of the gross tract area.

These binding elements were negotiated between Applicant and the community, and resulted in all but one of the community members participating in the hearing withdrawing their opposition. 8/19/09 Tr. 5-7 and Exhibit 88. Technical Staff had no substantial objections to the proposed binding

elements (Exhibit 89). It is noteworthy that, as a result of these binding elements, all but one of the dwelling units to be placed near existing homes in the neighborhood will themselves be detached, single-family homes. These are located to south and west of the site since there are no existing detached homes adjacent to the site, on the north and east.

In addition to these binding elements, there are General Notes on the SDP which further describe the subject site and Applicant's intentions. These proposals are subject to Site Plan and subdivision review and modification:

GENERAL NOTES

1. Existing boundary, topography, utility and surface feature information provided by CAS Engineering, Mt. Airy, Md.
2. Associated Natural Resources Inventory / Forest Stand Delineation prepared by CAS Engineering and approved by M-NCPPC on 6/27/07 (#420072150).
3. There are no known historic resources on this property.
4. This property is not within a Special Protection Area.
5. The site layout shown on this Schematic Development Plan is illustrative, and the Applicant acknowledges that the building coverage, the green area, and the number, size and layout of the units may have to be revised at Preliminary and / or Site Plan stage, subject to the restrictions contained in the Binding Elements.
6. A forest conservation plan shall be submitted with the preliminary plan of subdivision that indicates maximized tree retention and planting to create an urban forest.
7. A noise analysis shall be submitted with the preliminary plan of subdivision indicating existing baseline noise conditions, 20-year future conditions and methods to mitigate the noise impact.

It is the express intent of the following provisions to confirm that the Applicant (and its successors and assigns) is committed to including these elements on the Site Plan that will be submitted to the Montgomery County Planning Board for its review and approval:

8. At least fourteen visitor parking spaces will be provided including at least nine off-street parking spaces.
9. Construct, at the Applicant's (or its successors and assigns) expense, a sidewalk along one side of Findley Road from the east side of Drumm Avenue to the Subject Property, subject to the approval of the Montgomery County Department of Transportation, the Montgomery County Department of Permitting Services and any other governmental agencies that will have jurisdiction over such matters.
10. Include within the development a tot lot of approximately 2,000 square feet at a location to be determined at site plan, subject to the Planning Board's review and approval. A private walkway shall be provided within the development to the tot lot to allow for pedestrian access. The tot lot shall be maintained by the Homeowners Association and shall be made available to the community.
11. Include within the development a private pedestrian walkway extending from the sidewalk along the proposed Findley Road cul-de-sac that allows for safe and convenient access to the proposed pedestrian path adjacent to the Westfield Shoppingtown Wheaton's ring road, with the location to be determined at site plan, subject to the Planning Board's review and approval. The pedestrian walkway shall be maintained by the Homeowners Association and made available to the community.

These General Notes also address concerns raised by Technical Staff and the community, as well as issues raised at the hearing. Staff's concerns were addressed in General Note #6, which requires a forest conservation plan to be submitted at subdivision, and General Note #7, which requires a noise analysis, also to be submitted at subdivision. General Notes Numbered 8 through 11 were included as part of the negotiated agreement between Applicant and the community.

As proposed, all units have rear-entry garages. The Schematic Development Plan shows that the market-rate units will have two-car garages, and the 4 MPDUs will each have one-car garages. The detached homes will have room in their driveways for two additional cars, and there will be 14 visitor spaces along the inner circulation system, yielding a total of 70 parking spaces for the development (16 more than are required).

Vehicular access will be limited to Findley Road. A pedestrian circulation system is provided, including a sidewalk on Findley Road and a walkway between townhouse rows on the east to allow easy pedestrian access to the Wheaton Mall area. Trees would provide additional screening for the existing neighborhoods on the west and south. A cul-de-sac and a tot lot are additional amenities offered by Applicant.

Other information about the development is shown in text boxes on the SDP labeled "Site Data" and "Development Standards." These are reproduced below and on the following page:

SITE DATA

1.	Gross Tract Area:	131,364.52 sq.ft. (3.0157144 ac.)
2.	Existing Zoning:	R-60
3.	Proposed Zoning:	RT-8
4.	Number of Units Proposed:	27
5.	Proposed Unit Types:	
	a.	Single Family Detached = 3 Units (R-60 Zone standards)
	b.	Market Townhouses = 20 Units
	c.	MPDU Townhouses = 4 Units
6.	Number of MPDU's Required:	4 / Proposed: 4
7.	Off-Street Parking Required:	54 Spaces (2.0 Spaces / Unit)
8.	Off-Street Parking Proposed:	70 Spaces, as follows:
	-	S.F. Detached = 4 sp. / unit X 3 units = 12 spaces (2 in garage, 2 in driveway)
	-	Market Townhouse = 2 sp. / unit X 20 units = 40 spaces (2 in garage)
	-	MPDU Townhouse = 1 sp. / unit X 4 units = 4 spaces (1 in garage)
	-	Parking Bays = 14 spaces
	Total	70 spaces

DEVELOPMENT STANDARDS

STANDARD	REQUIRED	PROPOSED
Minimum Tract Area	20,000 sq.ft.	131,364.52 sq.ft. (3.0157144 ac.)
Maximum Density (with MPDU's)	29 DU (9.76 DU / Ac.)	27 DU (8.94 DU / Ac.)
Setbacks for Townhouses		
From SFD Zone	30'	30'
From Public Street	25'	25'
From Adjoining Lot		
End of Proposed Unit	10'	10'
Rear of Proposed Unit	20'	20'
Building Restriction Lines for Single Family Detached Lots (R-60 Standards)		
From Street R/W	25' min.	25' min.
Side Yard	8' min. / 18' total	8' min. / 18' total
Rear Yard	20' min.	20' min.
Maximum Building Height	35 feet	35 feet
Maximum Building Coverage (With MPDU's)	40% of Tract	Not more than 25% of Tract
Minimum Green Area (With MPDU's)	45% of Tract	Not less than 55% of Tract
Off-Street Parking	2.0 Spaces / Unit (54 spaces)	2.6 Spaces / Unit (70 spaces)

F. Development Standards for the Zone

Special regulations for the RT-8 Zone are spelled out in Zoning Ordinance §59-C-1.72, beginning with the stated “Intent and Purpose” of the Zone in §59-C-1.721. The issue of whether the subject application comports with the intent and purpose of the RT-8 Zone is discussed later, in Part V.A. of this report. We turn now to the other regulations of the Zone.

Although one stated intent of the R-T Zone is “to provide the maximum amount of freedom possible in the design of townhouses and their grouping,” the Zone nevertheless has special row design requirements for townhomes. Zoning Code §59-C-1.722. The maximum number of townhouses in a group is eight; and three continuous, attached townhouses are the maximum number permitted with the same front building line. Variations in the building line must be at least 2 feet.

Applicant’s illustrative SDP shows that these requirements have been met. As mentioned above, the proposed development is comprised of seven “sticks” of townhouses, none of them

exceeding four units. All the groups with more than three units show the required two-foot variation in their front building lines.

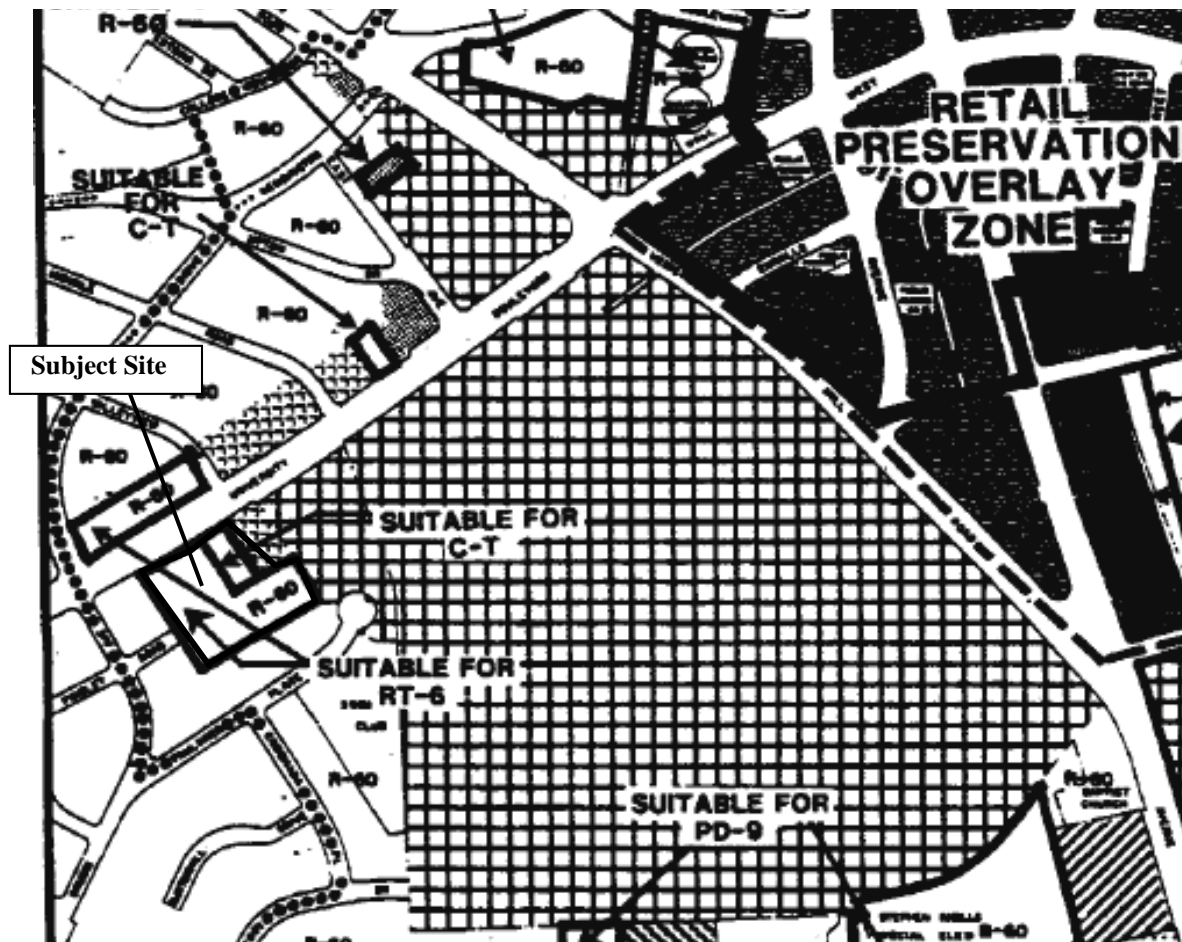
Zoning Ordinance §59-C-1.723 is inapplicable because Applicant has not sought to combine R-T-zoned tracts with different residential zones; rather, Applicant seeks to have the entire subject site reclassified into the RT-8 Zone. The Development Standards for the RT-8 Zone are spelled out in Zoning Ordinance §59-C-1.73 for developments without MPDUs and in §59-C-1.74 for developments with MPDUs. As shown in the table below from the Technical Staff report (Exhibit 58, p. 5), the proposed development would meet or exceed the applicable development standards for the RT-8 Zone.

Table 4: Development Standards [Footnotes omitted and acreage area corrected.]

Standard	Required/Permitted	Proposed
§59-C-1.722 Row Design.	(a) 8 townhouses is the maximum number permitted in any one attached row. (b) Three continuous, attached townhouses is the maximum number permitted with the same front building line. The variations in building line must be at least 2 feet. (c) For one-family attached units, there can be no more than 12 units in one row.	Between 3 and 4 townhouses in a row. The applicant proposes building line variations. No more than 4 in a row.
§59-C-1.723 Combined Tracts	Not Applicable	Not Applicable
§59-C-1.731 Tract Area and Density. (a) Minimum Tract Area (sf) (b) Maximum density of development (du)/ ac	20,000 sf 8 du/ac	131,364.52 sf <i>See §59-C-1.74(b)</i>
§59-C-1.732 Building Setbacks (minimum feet) (a) From any detached dwelling lot or land classified in a one-family, detached, residential zone (b) From any public street (c) From an adjoining lot (1) Side (end unit) (2) Rear	30' 25' 10' 20'	40' 28' 28' 40'
§59-C-1.733 Maximum Building Height (feet) (a) Main Building (b) Accessory Building	35' 25'	35' <i>None proposed</i>
§59-C-1.74 Development including Moderately Priced Dwelling Units (a) Additional use: dwelling unit, one-family attached (b) Maximum density of development (du)/ac of usable area (c) Maximum percentage of tract occupied by building may be increased (d) If necessary in order to accommodate the increased density: (1) Minimum Green Area (2) §59-C-1.722 may be waived	Not more than 40% of the total number of dwelling units. 9.76 du/ac [with 15% MPDUs resulting in a 20% bonus density]. 40 45% 2 foot off-set front building line of townhomes	3 one-family (detached) = 11.1% 8.94 du/ac 25% 55% N/A [<i>i.e.</i> , no waiver needed]

G. Consistency with the Sector Plan

The subject site is located in the area subject to the *1990 Wheaton Central Business District and Vicinity Sector Plan*. As mentioned at the beginning of this report, the vast majority of the property is classified in the R-60 zone, and only a small portion (3,242 square feet) on the northeastern border, is currently classified in the C-T Zone. The existing Sector Plan calls for a somewhat larger portion of the subject site (22,242 square feet) to be classified in the C-T Zone, as shown in the annotated Plat Map (Exhibit 76) reproduced on page 10 of this report. The remainder of the site (*i.e.*, about 83%) is recommended for the RT-6 Zone, as shown on page 47 of the Sector Plan.



Since the application calls for the entire property to be rezoned to RT-8, it is not consistent with the specific zoning recommendation of the existing Sector Plan. Community-Based Planning Staff

(*i.e.*, the “Vision” Division of Technical Staff) felt that the existing Sector Plan’s recommendations were still valid because, in their opinion, there had not been significant changes in the land use or the development pattern of the area since adoption of the Sector Plan (Exhibit 58, Attachment 10). The Vision Division also opined that since the Sector Plan was in the process of being revised, a rezoning to a zone other than that recommended in the current plan should await the overall update in the Sector Plan. The team leader for the Vision Division, Khalid Afzal, testified at the hearing to the same effect (7/31/09 Tr. 188-249).

Other than the issue with the Sector Plan, the “Vision” Division did not criticize the Applicant’s proposal. Despite Mr. Afzal’s position regarding the Sector Plan, Technical Staff’s Development Review Division recommended approval of the rezoning application (Exhibit 58). The Planning Board, however, voted 2 to 1 to follow Mr. Afzal’s recommendation, suggesting that consideration of the application should await completion of the Sector Plan re-write (Exhibit 60). The Planning Board also did not express any negative opinion about the application itself, noting only that “the amended application presented an improved design.”

At the hearing, Applicant suggested that the relocation of the access road to the Wheaton Mall adjacent to the subject site and the movement of the Giant food market constituted significant changes to the existing Sector Plan area, undermining its RT-6/C-T recommendation. 7/31/09 Tr. 215-217. Although Mr. Afzal did not agree, his testimony was critical on another point. Mr. Afzal admitted that Technical Staff is still in the data gathering and analysis stage regarding the Sector Plan update. His estimate is that the revised sector plan would be finally approved and adopted, “[p]robably sometime[] in spring to early summer time frame of 2011” (*i.e.*, two years from the hearing date). 7/31/09 Tr. 193.

The Hearing Examiner or the Council may postpone a hearing on a rezoning application for a reasonable time “if the Hearing Examiner finds that the pendency of any proposed master plan, sector

plan, [or] plan amendment, . . . may substantially affect the application under consideration.” Zoning Ordinance §59-H-4.5 and §59-H-5.3(a)(3) and (b). While a Sector Plan Amendment is being considered in this case, it is at a very early stage, and the evidence adduced at the hearing is that the new Sector Plan will not be effective, if at all, for another two years.

Applicant’s land use expert, Al Blumberg, also questioned the rationale for awaiting the new sector plan because the development proposed by Applicant already meets the general objectives outlined by Technical Staff for the new sector plan. On August 14, 2008, Technical Staff sent a memo requesting the Planning Board to authorize the preparation of the new sector plan (Exhibit 83). That memo states that the sector plan amendment has three goals: 1) to meet the County policy of focusing density at Metro stations to encourage transit use and make best use of that significant public investment; 2) to reinvigorate the Wheaton CBD and create a walkable community with a distinct identity; and 3) to create a center of jobs and housing on the eastern leg of the Metro Red Line.

Mr. Blumberg opined that the proposed plan meets those general objectives, as outlined in Exhibit 83. By moving forward with this rezoning, construction jobs will be created sooner; new MPDUs will be created sooner; and in general, new housing will be created sooner. So, moving forward with the proposed development now makes more sense, in his opinion, than waiting for the sector plan to be restudied and readopted. The RT zone reinforces the existing residential neighborhood and provides reasonable transition, one of the purposes of the RT zone. 8/19/09 Tr. 54-56.

Renée Miller, a senior planner in the Development Review Division of Technical Staff, whose qualifications include certification as an “AICP” (*i.e.*, American Institute of Certified Planners), testified (7/31/09 Tr. 249-256) that Development Review Division is Technical Staff’s project coordinator for local map amendments and special exceptions. As such, she pieced together all of the

comments received from other parts of her agency, and considering the Zoning Ordinance and the Sector Plan, arrived at her recommendation.

Despite Mr. Afzal's recommendation to postpone action on this application until the sector plan review was completed, she recommended approval now for a number of reasons: It is not a requirement that the requested zone be explicitly consistent with the master plan or sector plan in an R-T Zone application; however, considering the goals of the Sector Plan; the fact that this development will create MPDUs, which is a housing policy goal; that there were no real transportation issues; and that the site, given the surrounding uses, is appropriate in density and for a transitional use, she felt that application sought an appropriate use for the site. If the site had been developed in the RT-6 Zone, an MPDU requirement could not have been imposed.

The Hearing Examiner is persuaded, as was Development Review Staff, that this development should be considered now, rather than waiting for revisions to the Sector Plan which will likely take two years to complete and which are unlikely, on this record, to propose goals which would be unmet by the proposed development. A developer with a good development plan should not be made to wait two years or more just to have its plan considered, and the County should not be made to wait two years or more to get the benefits of a smart-growth project. If there were something wrong with the development plan, the Planning Board could have said so; it did not. Thus, the Hearing Examiner does not agree with the Planning Board's recommendation to postpone consideration of this application.

Mr. Blumberg further testified that Zoning Application G-877 conforms to the goals and requirements of the existing Sector Plan, including the essential land use recommendation on the property. 8/19/09 Tr. 58-59. Mr. Blumberg notes that the Sector Plan's land use recommendations for this site are mostly for R-T zoning, with the only question being "a minor increase in density from the RT-6 to the RT-8." 7/31/09 Tr. 311-312.

The Hearing Examiner finds that although the proposed development would not comport with the specific zone recommendations for the site, it would accomplish the goals and objectives of the Sector Plan for this area. As stated on page 46 of the existing Sector Plan, “low intensity new development [in this area] are encouraged to buffer existing single-family residences from adverse effects associated with major traffic arteries.” The proposed development will insulate the existing homes from University Boulevard to the north and Wheaton Mall access road to the east. On the same page, the Sector Plan provides:

As in the 1978 Plan, this Sector Plan recommends the use of Townhouse and Planned Development zoning. This zoning would encourage the development of a variety of housing types on individual parcels. Higher density development should be sited closer to the Metro station, to the business district, and to major roads. Lower density development (primarily single-family homes) would be developed adjacent to existing single-family areas.

The Hearing Examiner finds that that is precisely what the proposed development would accomplish. The results might not be as felicitous if the specific recommendations of the Sector Plan (*i.e.*, RT-6 and C-T) were followed. According to Mr. Blumberg, if the property were developed using the zones recommended in the existing Sector Plan (RT-6 and C-T), a more intense use than what is being proposed here would result (*i.e.*, 14 townhouses and 10,000 to 12,000 square feet of commercial use). 7/31/09 Tr. 314-316. There is no evidence contradicting Mr. Blumberg’s opinion on this point, and it leads the Hearing Examiner to conclude that the adjacent residential community is better off with the proposed RT-8 rezoning than the RT-6/CT rezoning that the existing Sector Plan recommended.

There is a specific Sector Plan recommendation for the site that will be followed. Figure 18 of the Sector Plan (p. 96) is the proposed street and highway plan, and it shows a proposed 50 foot right-of-way extending Findley Road into the subject property with a cul-de-sac, almost exactly as Applicant is showing on its plan. 8/19/09 Tr. 85.

In sum, Applicant’s proposed development on the subject property will provide a low to

medium density residential housing development that is compatible with existing single-family residences, will provide transition to the adjacent commercial areas and is consistent with the overall goals of the existing Sector Plan, and with Staff's outline for the revised sector plan. Given this record, the Hearing Examiner finds that this development should be considered now, and that it is fundamentally consistent with the objectives of the Sector Plan.

H. Public Facilities

Under the County's Adequate Public Facilities Ordinance ("APFO," Code §50-35(k)), an assessment must be made as to whether the transportation infrastructure, area schools, water and sewage facilities, and other services will be adequate to support a proposed development, and in turn, whether the proposed development will adversely affect these public facilities. Both the Planning Board and the Council have roles to play in this assessment process.

The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that are set by the County Council in the Growth Policy and biennially in the two-year, Growth Policy Element. While the final test under the APFO is carried out at subdivision review, the District Council must first make its own evaluation as to the adequacy of public facilities in a rezoning case because the Council has the primary responsibility to determine whether the reclassification would be compatible with the surrounding area and would serve the public interest. The Council's evaluation of public facilities at the zoning stage is particularly important because of the discretionary nature of the Council's review and the fact that the scope of Council's review is much broader at the zoning stage than that which is available to the Planning Board at subdivision, a process designed to more intensively examine the "nuts and bolts" of public facilities.

1. Transportation

Michael Lenhart, Applicant's expert in traffic engineering and transportation planning testified (8/19/09 Tr. 81-124) that direct vehicular access to the site is solely via Findley Road,

extended from Drumm Avenue. Drumm and Findley are both 50-foot right-of-ways. Residents can access Findley Road via Drumm Avenue to Maryland 193, and from the south on Drumm Avenue via McComas Avenue and Plyers Mill Road. 8/19/09 Tr. 84-85.

Mr. Lenhart did a transportation analysis and a queuing analysis for this site. When a rezoning application is submitted, a local area transportation review (LATR) study is required, if the project is going to generate more than 30 peak-hour trips. Technical Staff determines the scope of the required study (*i.e.*, how many intersections must be included in the study), depending on the number of trips that will be generated.

For the initial traffic study on September 25, 2008 (Exhibit 21(a)), Mr. Lenhart assumed 36 dwelling units, because the application had not yet been amended. Even with 36 units, the site generated only 30 trips, which was on the threshold of requiring a traffic study for LATR. The current application, with 27 units, generates only 23 evening peak hour and 15 morning peak hour trips as a maximum. Exhibit 43(d). Because it is less than 30 under the current application, an LATR traffic study is not required. Nevertheless, the findings of both studies, the September 25, 2008 study and the updated study of March 18, 2009 (Exhibit 43(d)), found that all of the studied intersections were operating at critical lane volumes (CLVs) of approximately 700 or less. Once the new trips are added in, the worst intersection will operate at 701 CLV, well below the threshold for this policy area, which is a CLV of 1,600, according to Mr. Lenhart's final revised report of July 29, 2009 (Exhibit 85). Thus, even though an LATR study is not required, this application would pass the review. 8/19/09 Tr. 86-92.

Mr. Lenhart also noted that Policy Area Mobility Review (PAMR) was satisfied because the site's location near a Metro fulfilled the required mitigation for the Kensington/Wheaton Policy area. 8/19/09 Tr. 97-100.

Mr. Lenhart was able to walk from the site to the Metro in about 10 minutes, and it can easily

be done within 15 minutes at a slow pace. A WMATA ridership survey found that developments such as this one, within 3,000 feet of a Metro, had about a 28% ridership. 8/19/09 Tr. 105-108.

Mr. Lenhart also did a queuing analysis of Drumm Avenue, approaching University Boulevard (MD 193) because of concerns raised by the community. Exhibit 43(d). He found that there was little or no delay at the intersection and that the maximum queue was two to three cars. The number of cars exiting the proposed development would be about one every five minutes, which would have no impact on the queue or the level of service of the intersection.. 8/19/09 Tr. 109-111.

In the same report, Mr. Lenhart looked at the accidents reported at the Drumm Avenue/ MD 193 intersection, and he found that of the five accidents reported over three years (2005- 2007), only one involved a vehicle exiting Drumm Avenue. He concluded that there are no accident patterns or operational concerns at this location that would be evident based upon this information. In his opinion, the proposed rezoning will not adversely impact the surrounding area from the standpoint of traffic, and the proposed access to this site and on-site circulation, as reflected on the schematic development plan, are adequate and safe for both vehicles and pedestrians.

This project is in very close proximity to the Metro, with excellent pedestrian connections to the Metro via two separate routes. Based on the queuing report, the LATR study and the PAMR analysis, Mr. Lenhart opined that the project meets or exceeds all applicable guidelines and requirements, and is consistent with both the Growth Policy and the Sector Plan, regarding transportation. It is also compatible with the surrounding area in terms of traffic and transportation, in that it is an excellent transition from the mall use to the existing single-family homes, and does not place a burden on the roads or intersections. Parking will also be more than adequate 8/19/09 Tr. 111-118.

Included in Mr. Lenhart's final revised report (Exhibit 85) is a review of other possible residential developments to show that a commercial component would generate much more traffic than a residential development. An RT-8 development, as proposed, would generate roughly half the

traffic of a mix of RT-6 and CT at this site. 8/19/09 Tr. 102-104.

Transportation Planning Staff, in a memorandum appended to the Staff report as Attachment 8, agreed that an LATR traffic study was not needed in this case and found that “the transportation network [is] adequate to support the rezoning.” Transportation Planning Staff recommended that, at subdivision, the development be limited to 24 townhouses and three single family detached units, and that Applicant satisfy all State and County transportation requirements.

Staff accepted Mr. Lenhart’s transportation studies, and determined that both LATR and PAMR were satisfied. Applicant’s 15% PAMR mitigation requirement was fulfilled because the townhouse development *at this location* [i.e., about 2300 feet from the Wheaton Metro Station] would be expected to generate 25% fewer (6) vehicle trips than the countywide average on which the mitigation is based.”

Transportation Staff also found that there was no queuing problem on Drumm Avenue.

Based on this record, the Hearing Examiner finds that transportation facilities are adequate and will not be adversely affected by the proposed development.

2. Utilities

Applicant’s civil engineer, Curt Schreffler, testified the site is in a well-developed area of the County, and that facilities for water, sewer, gas and electric abut the site and are sufficient for this proposed development. 8/19/09 Tr. 66.

Technical Staff stated in its report that the subject site is served by adequate public water and sewer systems, and noted (Exhibit 58, p. 7):

The amended application was reviewed by the Washington Suburban Sanitary Commission (WSSC) staff. It was concluded that single-family detached and townhouse units at the proposed location would not significantly impact the WSSC distribution and collection system. (See Attachment 7.) Additionally, WSSC staff stated that the proposed rezoning would not significantly impact the sewerage system and that the downstream gravity sewer system has existing capacity.

Mr. Schreffler also testified that this project can be designed and built with no adverse impact on the associated public facilities in this area. 8/19/09 Tr. 66, 68 and 71

Based on this evidence, the Hearing Examiner finds that the property will be served by adequate utilities and other services.

3. Schools

Technical Staff advises that the schools serving the subject property are located within the Albert Einstein Cluster. The current Growth Policy schools test finds capacity adequate in the cluster. Exhibit 58, p. 8. Technical Staff based this determination upon an April 3, 2009 letter from Bruce H. Crispell, the Director of Long-range Planning for the Montgomery County Public Schools. His letter is appended to the Technical Staff report, Exhibit 58, as Attachment 9.

Mr. Crispell stated in his letter that the anticipated 27 unit development would generate approximately 7 elementary, 2 middle and 3 high school students.

The subject property is served by the Rock View Elementary School, the Newport Mill Middle School and the Albert Einstein High School. Mr. Crispell notes in his letter that Albert Einstein High School is part of the “Downcounty Consortium,” where students may choose to attend their base area high school or one of four other high schools in the Consortium.

Mr. Crispell reports that enrollment at Rock View Elementary School currently exceeds capacity and is projected to exceed capacity in the future. This space deficit will be addressed with a 13-classroom addition scheduled to open in August 2011. That time period would coincide well with the timeframe for the development suggested by Applicant’s land planner, Al Blumberg, who testified that there should be school capacity at the same time that there is need for capacity generated by this proposal. 8/19/09 Tr. 56-57.

Mr. Crispell’s letter reported that enrollments at both the Newport Mill Middle School and the Albert Einstein High School are currently within capacity and are projected to stay within capacity.

Mr. Crispell concludes that “[t]he current Growth Policy school test (FY 2009) finds capacity

adequate in the Einstein cluster.”

Given Mr. Crispell’s conclusion and the plan for added capacity for elementary school students, the Hearing Examiner finds that there is sufficient school capacity for the proposed development.

I. Environment

Applicant’s expert in civil engineering, Curt Schreffler, testified that he prepared the NRI/FSDs and a storm water management concept plan (SWMCP) for the property. The NRI/FSD has been approved by Technical Staff (Exhibit 10), and the SWMCP (Exhibit 92(g)) is under review by the Department of Permitting Services (DPS). 8/19/09 Tr. 61-62.

There are 1.02 acres of on-site forest, which Technical Staff classified as a moderate priority. Exhibit 58, p. 9. However, there are no steep slopes, highly erodible soils, streams, wetlands or other sensitive environmental features on the site. It is not in a special protection area or a primary management area. 8/19/09 Tr. 67, 71-73.

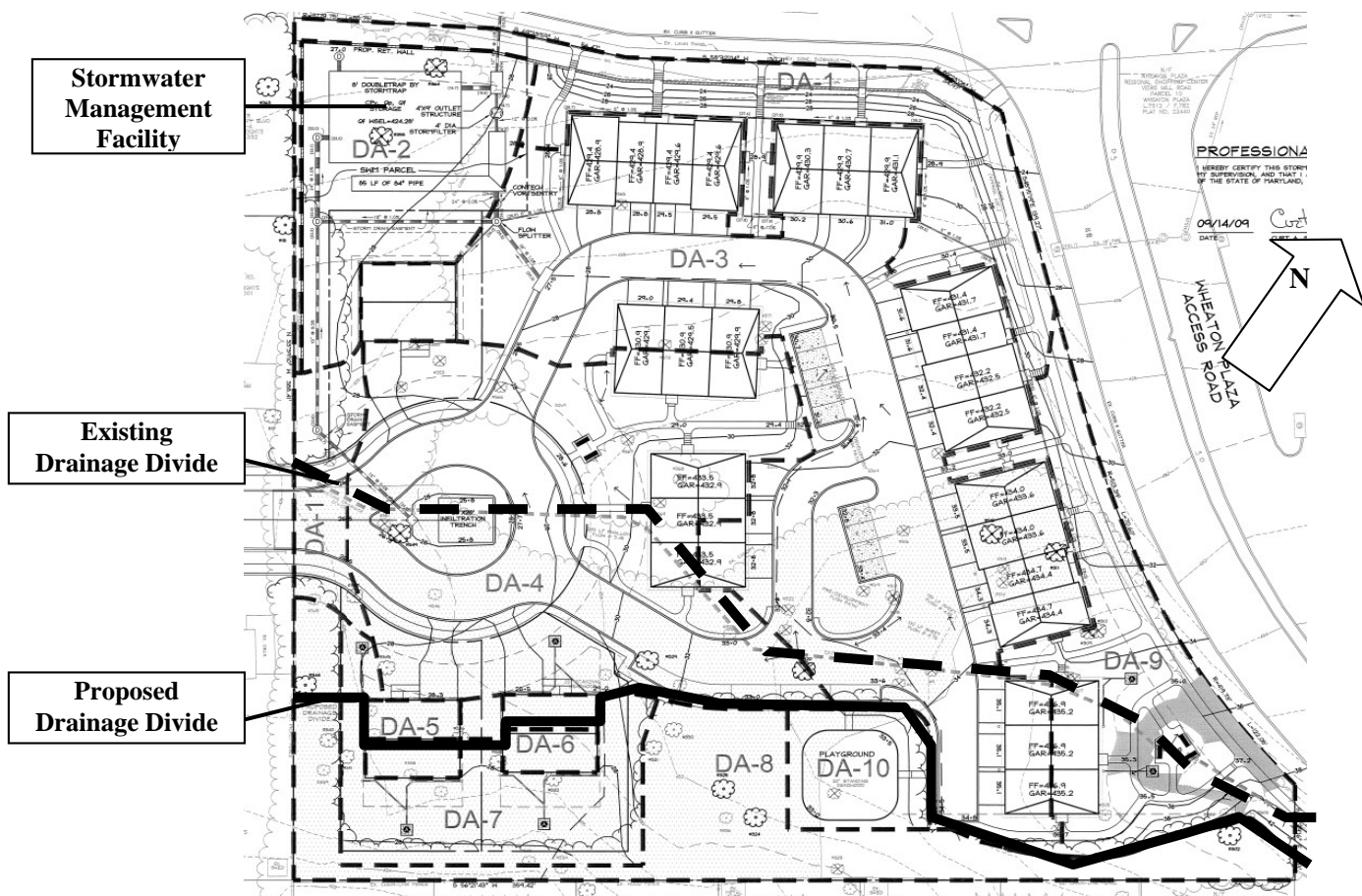
1. Stormwater Management:

Mr. Schreffler testified that the County is requiring control of both the ten year and hundred year storm events for quantity control (*i.e.*, channel protection). That is over and above the normal requirements, but due to the watershed the site is in, and conditions a mile or two downstream, these extra measures are called for.

The proposed stormwater management system will provide quantity control in an underground facility located in the northwest corner of the site, which topographically is the low point of the property. The majority of the site drains there naturally, and then will discharge to the established storm drain system in University Boulevard. There will also be quality control and recharge, which may consist of infiltration trenches, dry wells, coarse pavement and other similar smaller stormwater management elements. DPS agreed to use of an underground concrete system rather than an open

pond on this particular site due to the close proximity to the neighborhood. The area above the underground system can be landscaped and become an amenity. This system will avoid any adverse impacts on the neighborhood, and runoff towards the homes on the south should actually be reduced because the drainage divide will be moved further south, which will direct more flow from the site to the stormwater management facility on the north, near University Boulevard. 8/19/09 Tr. 64-66, 68-70, 75-81

This change is shown on Exhibit 84, which highlights the existing drainage divide in yellow (dashed line), and the proposed drainage divide in blue (solid line), so that all the road surfaces and all the townhouses on the site would drain to Applicant's facility in the northwest corner of the site. The only homes draining to the south are the rears of the two detached, single-family homes on the southwest of the site, which will drain into dry wells, so there will be no increase in runoff to the south. Applicant is not required to control runoff from forested areas and lawn areas, because that is a natural flow.



Technical Staff cautions that the stormwater management facility shown on the schematic development plan is illustrative only and may not be the same size, location or configuration as shown currently, following subdivision. The stormwater management plan is not required until subdivision, and DPS has not yet approved the SWMCP for this project. Nevertheless, the Hearing Examiner finds that Applicant has at least demonstrated that a stormwater management plan can be employed for the proposed development which will not have adverse effects on the environment or the adjacent community.

2. Forest Conservation:

M-NCPPC's Environmental Staff reviewed the application in its memorandum of June 12, 2009, which is Attachment 11 to the Technical Staff report (Exhibit 58). Staff noted that this property is subject to the Montgomery County Forest Conservation Law, and that a forest conservation plan will be required with the submission of the preliminary plan of subdivision. It recommended approval of the rezoning application, with two conditions:

- 1) Submission of a forest conservation plan with the preliminary plan of subdivision that indicates maximized tree retention and planting to create an urban forest; and
- 2) Submission of a noise analysis with the preliminary plan of subdivision indicating existing baseline noise conditions, 20-year future conditions and methods to mitigate the noise impact.

These two conditions are reflected in the SDP as General Notes 6 and 7, and Applicant's engineer testified that they will be followed. 8/19/09 Tr. 71-73. Given the location of this project, Environmental Planning staff recommends that an urban forest strategy be utilized, maximizing tree cover through the forest conservation plan. Good quality specimen trees are present, but are generally along the property's edge, and Environmental Staff believes that these trees have the potential to be incorporated into future development scenarios.

According to Staff, this project is not required to comply with the County's Green Buildings law; however Applicant proposes to provide 55% of the site as green area, even though only 45% is required by Zoning Ordinance §59-59-C-1.74. Environmental Planning staff agrees that the property should be able to achieve this green area standard, especially if environmental site design principles are used.

Based on this record, the Hearing Examiner is satisfied that any environmental concerns on the subject site are being appropriately addressed.

J. Community Concerns

As discussed at the beginning of this report, letters were received in support of the application (Exhibits 55 and 61) and in opposition (Exhibits 49, 52, 53, 54 and 81).⁸ The pre-hearing opposition, led by the Kensington Heights Citizens Association (Exhibit 49), raised four concerns – sector plan compliance, compatibility, traffic and stormwater management. One opponent wanted the site “to remain in its current, unbuilt state” (Exhibit 52); however pre-hearing efforts to have this property designated for “Legacy Open Space” failed. Exhibit 58.p. 9. Support for the application, including an endorsement by the “Action Committee for Transit” (Exhibit 55), was based on the fact that the proposed development is an excellent example of “smart growth.”

Technical Staff summarized community concerns as follows (Exhibit 58, p. 10):

The Kensington Heights Citizens Association submitted written correspondence in opposition to the applicant's proposal to reclassify the subject site from the R-60 zone to the RT-8 zone. The association does not oppose development of the site with townhouses at the RT-6 density. The association has indicated that development under the RT-6 zone would better preserve green space and visual screening by enabling new construction to be concentrated on the less densely wooded portions of the lot and addresses some of the concerns with the original plan. (See Attachment 13.)

The following community witnesses appeared at the hearing: Donna Savage, individually and

⁸ Only letters received after the March 19, 2009 amendment of the application are listed since that amendment significantly changed the proposed development.

on behalf of the Kensington Heights Citizens Association, Karen Cordry, Molly Brunjes, Aaron Garnett, Jerome Mortman and Virginia Sheard. Although all were initially opposed to the application, this situation changed dramatically after the first day of the hearing. When the hearing resumed on August 19, 2009, the parties announced that an agreement had been reached between the Applicant and the community, and all but Virginia Sheard withdrew their opposition to the application. 8/19/09 Tr. 5-7 and Exhibit 88.

Ms. Sheard still felt that the site should either be developed under the current sector plan recommendations or under whatever the approved and adopted sector plan recommendations are when it is finalized. Ms. Sheard thus supports the Community-based Planning Division recommendation, and feels that if the property is developed now, it should be done either the RT-6 Zone or the R-60 Zone. She assumed that C-T Zone Sector Plan recommendation was “off the table” since Applicant proposed a residential development. 8/19/09 Tr. 129-130.

Donna Savage testified individually and on behalf of the Kensington Heights Citizens Association. She read a short statement, explaining the change in her position (8/19/09 Tr. 6-7):

. . . We withdraw our opposition to this rezoning application because of the unique opportunity to realize the input we've had in this case. We have earned concessions on the number of units, the placement of single-family homes, the design of triplex townhomes, pedestrian safety, visitor parking and a playground, . . . all of which you'll hear about later. All of which we would not have won if we had not fought.

* * *

If the new sector plan were a distant possibility the situation would be different. If this applicant goes away, then the new sector plan will be in force in about two years and it will most likely recommend equal or greater density than what is proposed by the current applicant. However, we would be unable at that time to cash in on any of the effort we have expended in the last two plus years. We appreciate the opportunity to work together with the applicant to maximize the quality of this addition to our community, Kensington Heights. . . .

At the end of the hearing, Ms. Savage reiterated her position that “the Kensington Heights

Citizens Association has withdrawn its opposition, and that this withdrawal is the current and final community view [of Kensington Heights].” 8/19/09 Tr. 141-142.

The Hearing Examiner finds that the conclusion of the Kensington Heights Citizens Association is a reasonable one. All of the issues raised by the community – sector plan compliance, compatibility, traffic and stormwater management – have been discussed in previous sections of this report, and the amended rezoning application, as limited by its binding elements, represents an excellent opportunity to achieve a development on the site which is compatible with the existing homes and which provides buffering from both Wheaton Mall and major roadways. Based on the record, it will not create traffic or stormwater management problems, and it will achieve the goals, albeit not the specific recommendations, of the existing sector plan.

It is perhaps not surprising that some neighbors would like the subject site to remain undeveloped (Exhibit 52) or be turned into a park (Exhibit 58, p. 9); however, the owner of the subject site has the right to proceed with development of its property in accordance with County law, which includes applying for rezoning, just as any of its neighbors could do regarding their own properties.

The decision on a zoning application “is not a plebiscite.” *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). It is not the Hearing Examiner’s function to determine which position is more popular, but rather to assess the Applicant’s proposal against the specific criteria established by the Zoning Ordinance, and to evaluate compatibility and the public interest. The evidence produced by both sides must be considered in that analysis, but the facts and the law ultimately determine whether a rezoning application should be granted. As discussed in Part V of this report, the Hearing Examiner finds that the amended application satisfies the criteria for rezoning the subject site to the RT-8 Zone.

IV. SUMMARY OF HEARING

The hearing began on July 31, 2009, but could not be completed on that date, and it therefore resumed on August 19, 2009. Applicant called five witnesses, Chris McGoff, a partner in Applicant; Sterling Mehring, the managing partner; Alfred S. Blumberg, a land planner; Curt Schreffler, a civil engineer; and Michael Lenhart, a transportation planner. Martin Klauber, the People's Counsel, participated in the hearing, but he did not call any witnesses. Two members of Technical Staff, Khalid Afzal and Renée Miller, testified at the request of the parties.

The following community witnesses appeared at the hearing: Donna Savage, individually and on behalf of the Kensington Heights Citizens Association, Karen Cordry, Molly Brunjes, Aaron Garnett, Jerome Mortman and Virginia Sheard. Although all were initially opposed to the application and were scheduled to so testify, only Karen Cordry testified before most of the community reached an agreement with Applicant and withdrew their opposition. When the hearing resumed on August 19, 2009, the parties announced that this agreement had been reached, and all but Virginia Sheard withdrew their opposition to the application. 8/19/09 Tr. 5-7 and Exhibit 88. Therefore, the only opposition testimony summarized herein is that given by Ms. Sheard.

A. Applicant's Case in Chief

1. Christopher McGoff (7/31/09 Tr. 41-104):

Christopher McGoff testified that he is the founder and CEO of a consulting firm called "The Clearing," and a partner in Kensington Heights LLC. He is an investor and an active partner in the proposed development. Mr. McGoff is involved in three other real estate projects in Silver Spring. He described the subject site, noting that nothing has been done to this property in a long time; it's just overgrown with vines and trees and there are no manmade things on it at all.

Mr. McGoff testified that he is a professional negotiator, and he designed Applicant's outreach to the community. His vision for this property is to make it possible for families and environmentally

conscious professionals to live near a Metro and walk to restaurants, shopping, work and recreation.

Mr. McGoff believes there is too much commercial development in the area, and large apartment buildings would not be compatible with the neighborhood, but the proposed townhouses would be and would also serve as a transition. They would be “a wonderful little community compatible with its surroundings.” 7/31/09 Tr. 53.

Mr. McGoff outlined seven principles of smart growth, according to the Smart Growth Network, smartgrowth.org (7/31/09 Tr. 54-56):

1. The property provides a wide range of transportation alternatives to its residents;
2. It creates a walkable neighborhood;
3. It promotes Metro ridership;
4. It creates a range of housing opportunities;
5. It is compatible and complimentary to the existing community;
6. It creates a safer walking path for the existing community to essential services; and
7. It extends the existing community.

According to Mr. McGoff, this site presents an extremely rare opportunity for smart growth because of its proximity to Metro, shopping and major roadways, and “this is an absolute smart growth project.” 7/31/09 Tr. 61. Mr. McGoff testified that he and his family walked the neighborhood at a slow pace and found many services within a short distance of the subject site, as shown in Exhibit 64(b). Examples are 4 minutes to a pool and to a supermarket, 10 minutes to Wheaton Plaza and 14 minutes to Metro. 7/31/09 Tr. 62-63. If you are driving, its only 450 feet from the site to the nearest big road, University Boulevard, as shown in Exhibit 64(c). 7/31/09 Tr. 67. Mr. McGoff used Exhibit No. 64(d), to list “Why is it in the Public Interest to Approve the Application Now as Opposed to Waiting the Additional Two to Three Years” for the amendments to the Sector Plan. This includes, *inter alia*, substantial adherence to the master plan, creation of construction jobs now, adding to the tax base now, and creating 4 MPDUs now. He indicated that the planning process should not be used to stop a good, smart-growth project from happening.

Mr. McGoff described his community outreach efforts. He also noted that the two sets of

townhouses in the middle were designed to look like large single-family detached homes, walkways were added and proposed density reduced. The design was improved by the community outreach. It would be a green, smart growth project. Having the land just sit there is not in the public interest. Development under the R-60 or RT-6 Zones would not require MPDUs.

2. Sterling Mehring (7/31/09 Tr. 105-120):

Sterling Mehring testified that he is a developer, a real estate broker and Applicant's managing partner. He viewed this property an opportunity to have a bridge between the community and the good services that are nearby, but also a buffer from the existing community. He envisioned an architectural streetscape along University Boulevard and up the access road into Westfield Mall that would provide masonry and something somewhat formidable that would transition down into more protected and less dense property behind it. Mr. Mehring believes that the current RT-8 Zone project addresses the design and compatibility issues raised by the Planning Board in rejecting the original RT-10 project. It places the single-family homes next to the current single-family homes, terminated the street with the cul-de-sac which increased public safety, and clustered the townhouse units into smaller groups, with MPDUs tucked in, that would be more single-family residential in appearance. Mr. Mehring agreed that Applicant would be bound by the binding elements.

3. Alfred S. Blumberg (7/31/09 Tr. 121-188; 308-329; and 8/19/09 Tr. 10-59; 123-124):

Alfred Blumberg testified as an expert in land planning. He reviewed the zoning history of the site and described the adjacent service road for Wheaton Plaza. It intersects just north of the site with University Boulevard, which is a six-lane divided highway, with left turn storage lanes. It has a 120-foot right-of-way, and is a major highway, State Route 193. Mr. Blumberg described the surrounding area, including Wheaton Plaza, now Westfield Shopping Mall, or Wheaton Mall, which is adjacent to the subject site, along part of its eastern border. It has at least 1.25 million square feet in area of retail space. There are also some out-parcels and some office

buildings, primarily along Veirs Mill Road, which are oftentimes seen as part of that, making it over two million square feet total. Aside from Wheaton Mall and its access road, to the east, and University Boulevard to the north, the adjacent and confronting properties are single-family detached homes in the R-60 Zone; however, the confronting homes on the north side of University Boulevard have five special exceptions for nonresidential uses along that block. The Kenmont Swimming Club is on the south side of Faulkner Place, one block south of the subject property. 7/31/09 Tr. 129-133.

Mr. Blumberg proposed to define the surrounding area more narrowly than Technical Staff on the western border. His surrounding area (Exhibit 67(a)) would stop at Drumm Avenue, which is the western edge of the Sector Plan area, while Staff would extend the surrounding area another 1,000 feet or so to the west, up to Hobson Street. Exhibit 67(b). Mr. Blumberg admitted that the proposed development might have impacts, visual and otherwise, extending beyond his proposed surrounding area, and indicated he could live with Technical Staff's definition. 7/31/09 Tr. 136-138.

Mr. Blumberg reviewed the changes Applicant made from its original 36 unit proposal to take account of the concerns raised by the Planning Board and the neighbors, eventually resulting in the present density (27 units) and configuration, as reflected in Exhibits 68(a) –(d). The closest home to the proposed new dwelling units is Molly Brunjes's, which is 40 feet from one of the proposed detached homes and 145 feet from one of the proposed townhouse groups, as shown on Exhibit 68(d). 7/31/09 Tr. 140-151.

Where there are confronting single-family homes to the west and south of the project, Applicant intends to have single-family homes on the subject site or a profile that is close to a single-family home (*i.e.*, exposing the narrow end of the townhouse unit to the single-family home). In the middle of the development would be two townhouse groups, each designed to look like a large single

family home. The view from existing Findley Road into the project would look like single-family homes, and then as one would drives around the cul-de-sac, the view is of single-family homes and townhouse groups designed to appear as single-family homes. The middle unit would have a sidewalk and front door facing the cul-de-sac. So as you're going around the cul-de-sac, what you see is what appears to be a large single-family home with a single front door. Thus, going around that cul-de-sac is a continuation of what you would see elsewhere in the neighborhood.

All of these townhouses have internal garages, located on the rear of the homes, and the fronts of the homes face outwards, with landscaping in front, in keeping with the green corridor recommendation of the master plan. The market rate units would have two garage units, and the four MPDUs have single car garages, all of which are accessed from the interior service road. There were initially nine additional parking spaces for visitors, and that was upped to 14 visitor spaces following negotiations with the community. 8/19/09 Tr. 15. Everyone would thus have their own parking spaces, and there would be some excess parking spaces as well. 7/31/09 Tr. 152-153. The commitment to having single-family detached units in the proposal is a binding element.

Using a cross-section (Exhibit 69), Mr. Blumberg further described the site, noting that the subject site's elevation is 18 feet higher than the homes on Faulkner Place. Applicant created enough green areas between the edge of the lot and the property line to the south to provide for adequate landscaping, which would be in homeowner association ownership. 7/31/09 Tr. 159-161.

By providing the densest area closest to the commercial areas to the east, the development serves as a transition to the single-family, detached, R-60 lots to the west. Mr. Blumberg opined that this is also an appropriate location and a compatible location for townhomes in the community, both for reasons of smart growth, and for the physical relationships. As shown in the rendered version of the SDP (Exhibit 70), there is a sidewalk and will continue to be a sidewalk along University Boulevard, and Applicant will add sidewalk parallel to the Wheaton Mall service road, where there

currently is none. The sidewalk fronting along the service road going into the mall would be on the subject property, whereas the University Boulevard sidewalk is on the public right-of-way. There is no dedication required. Sidewalks will be located between the townhouse sticks of units, and Applicant has proposed building a sidewalk along the sides of Findley Road, where there are no sidewalks currently. Applicant proposes to have sidewalks leading from the public sidewalks to the units and also to University Boulevard and into the mall property. There will be amenities and landscaping and open space that would be expected of a development of this size and nature, including a small sitting area in the east corner, with sidewalks leading to it. Storm water management is in the northwest corner adjacent to University Boulevard. It will be an underground structure, but there won't be anything permitted on it except grass. 7/31/09 Tr. 162-168.

In Mr. Blumberg's opinion, the proposed density would be compatible with the existing density of the area. The RT-6 Zone, with MPDUs, would permit up to 7.32 units to the acre, while the RT-8 Zone would permit up to 9.76 units to the acre with maximum MPDUs. The proposed development is at 8.94 units to the acre, which is the midpoint between the RT-6 and the RT-8, RT-6 being 7.32, and RT-8 being 9.76. Thus, the proposed development does not propose the full density which could be achieved under the RT-8 Zone. 7/31/09 Tr. 175-179.

Mr. Blumberg examined the record plats of the lots in the block surrounded by Drumm Avenue, Faulkner Place, the shopping center, and University Boulevard. The acreage of those 24 lots is 3.95 acres, which results in a current density of 6.08 units per acre. If you combine the existing surrounding lots density with the density Applicant proposes on the subject site, that ends up with a combined density of 7.17 units per acre, which is slightly lower than the maximum density of 7.32 with MPDUs in the RT-6 zone. Mr. Blumberg added that one of the purposes of the RT zone is to provide a transition between high density commercial or multi-family residential, and low density residential. Thus, the somewhat higher density of the proposed develop to the surrounding

development actually fits into the transitional purpose of the RT zone. 7/31/09 Tr. 175-181.

Mr. Blumberg and Applicant's attorney, Mr. Robins, walked from the site to the Metro, as shown in Exhibit 71(a), and it took 11 to 11 and a half minutes to walk the 3,078 feet. An alternate route, shown in Exhibit 71(b), is almost exactly the same distance (9 feet longer). 7/31/09 Tr. 183-185.

Mr. Blumberg pointed out that one of the objectives of the 1990 sector plan is that there be housing diversity, and this application does provide some housing diversity, with single-family detached, single-family attached, plus moderately priced dwelling units. 7/31/09 Tr. 308-309.

Exhibit No. 75 shows the area of the property (3,242 square feet) that was zoned CT by local map amendment G-594. Exhibit No. 76 shows the area (22,242 square feet) that was proposed for the C-T Zone in the 1990 sector plan. Aside from that, Mr. Blumberg feels that the application does comply with the land use recommendations of the sector plan, which is for RT, with the only question being "a minor increase in density from the RT-6 to the RT-8." 7/31/09 Tr. 311-312.

According to Mr. Blumberg, if the property were developed using the zones recommended in the Sector Plan (RT-6 and C-T), a more intense use than what is being proposed here would result (*i.e.*, 14 townhouses and 10,000 to 12,000 square feet of commercial use). 7/31/09 Tr. 314-316.

Mr. Blumberg further testified, describing the proposed general notes and binding elements, some of which were modified in an agreement with the community. 8/19/09 Tr. 11-19; 33-36. He described the main goals of the sector plan as to creating housing in close proximity to the transit station and in close proximity to the retail center to support all those uses. According to Mr. Blumberg, this plan does comport with those goals and objectives of the sector plan. The achieved density would be 8.94 du/ac, which is close to the maximum density you can achieve in the RT-6 Zone of 7.32 du/ac, with MPDUs. 8/19/09 Tr. 36-41.

Mr. Blumberg opined that the application meets the purposes and intents of the RT zone, as spelled out in Section 59C-1.721 of the Montgomery County Zoning Ordinance. It lists two criteria. One is that the purpose of the RT zone is to provide suitable sites for townhouses in sections of the county that are designated or appropriate for residential development at densities allowed in the RT zone. The site has been designated as RT, although it's RT-6, a variation on that density theme. It's also an appropriate location for townhouses, because the location is surrounded by major roads, University Boulevard and the access road to the mall, with commercial zoning on one side, and low density residential, single-family detached residential surrounding to the other sides. Townhouse development which would be compatible with the surrounding development. 8/19/09 Tr. 42-43.

The second purpose of the zone is that it's suitable for townhouses in the location, where there is a need for a buffer or transitional uses between commercial, industrial or high density apartment uses, and low density one family uses. In Mr. Blumberg's opinion, this meets that standard precisely in that the site is between the C-2 and C-T zones on one side, and the low density residential zones on the other, so there's the transition or buffer between those two uses. 8/19/09 Tr. 42-44.

Mr. Blumberg feels that the application meets the intent of the RT zone to allow the maximum freedom possible in the design of townhouses and the grouping and layout. Also, by limiting the units to three in a row and four in a row, as opposed to the eight that's permitted in the zone, does provide flexibility and freedom to design those in a manner that's compatible with the community and provides a good design as well. The proposal would provide the development with amenities normally associated with less dense zoning categories, such as open space, sidewalks and connectivity that typically would be associated with less dense developments. The third item in the intent is to permit the greatest possible amount of freedom in the types of ownership of townhouses and townhouse developments, which in this case will be fee simple. 8/19/09 Tr. 45-46.

Another intent of the zone is to prevent detrimental effects to the use or development of

adjacent properties or the neighborhood. By limiting the access to Findley and creating the cul-de-sac and turnaround, this development will become a part of the overall community, which will prevent any kind of detrimental effect on use or development of adjoining properties. Likewise, it will promote the health, safety, morals and welfare of the present and future inhabitants of the district by providing a connecting sidewalk system which will improve walkability in proximity to Metro. 8/19/09 Tr. 44-46.

The proposal also complies with row design requirements, with no more than four units together, while eight are permitted, as well as two-foot offsets as needed. The maximum amount of tract to be occupied in buildings is 40 percent in the RT-8 Zone, with MPDUs, and Applicant is binding itself to no more than 25 percent, considerably less than the maximum permitted. In the same way with the green area, no less than 45 percent is required and Applicant is proposing a binding element to limit itself to no less than 55 percent of the tract to be in green area. 8/19/09 Tr. 46-47.

Mr. Blumberg also compared the current site with other nearby sites which were rezoned to the RT-15 zone, almost twice the density of those proposed, as discussed in his land use report (pp. 24-25). He cited G-786, G-846, G-847 and G-798. In none of these cases did the master plan recommend the RT-15 Zone. These went from low density R-60 and R-90 to RT-15. So, there is considerable weight that's already been implemented in the Wheaton area that rezonings to the RT Zone are not necessarily limited to properties that are recommended RT in the master plan. 8/19/09 Tr. 47-49.

Based upon Mr. Blumberg's review of Mr. Lenhart's traffic analysis and report, the traffic generated from this proposed development is minimal and will not adversely affect the surrounding area. Mr. Blumberg also opined that it would be in the public interest. It would provide four MPDUs and would be walkable – a smart growth project. It meets the Growth Policy recommendations for providing housing adjacent to retail as well as to Metro, thereby encouraging utilization of these

public facilities. The infrastructure of roads and water and sewer is already in place for this proposed development. It provides a transition between the Wheaton Mall and the access road into the Wheaton Mall to the R-60, the existing R-60 residential neighborhood to the west. It is both an appropriate and a compatible location for the proposed development. It eliminates the threat to the community of the CT Zone. He believes it is in the public interest to preserve a residential neighborhood rather than create a further extension of the commercial development in the vicinity. This modest increase in density in exchange for the deletion of the additional commercial is a reasonable and appropriate request. 8/19/09 Tr. 52-54.

On August 14, 2008 Technical Staff sent a memo requesting the Planning Board to authorize the preparation of the new sector plan (Exhibit 83). That memo states that the sector plan amendment has three goals: to meet the county policy of focusing density at Metro stations to encourage transit use and a best use of that significant public investment. Two, to reinvigorate the Wheaton CBD and create a walkable community with a distinct identity. And three, to create a center of jobs and housing on the eastern leg of the Metro Redline. Mr. Blumberg opined that the proposed plan meets those general objectives, as outlined in Exhibit 83. By moving forward with this rezoning, construction jobs will be created sooner; new MPDUs will be created sooner; and in general, new housing will be created sooner. So, moving forward with the proposed development now makes more sense, in his opinion, than waiting for the sector plan to be restudied and readopted. The RT zone reinforces the existing residential neighborhood and provides reasonable transition, one of the purposes of the RT zone. In Mr. Blumberg's opinion, the new sector plan could recommend at least RT-8 and will certainly recommend higher density than in the existing plan, given the new emphasis over the past 20 years since the adoption of that 1990 plan on smart growth and higher densities in close proximity to Metro. 8/19/09 Tr. 54-56.

Mr. Blumberg noted that Mr. Crispell of MCPS found that under the current Growth Policy

school test for FY 2009, the capacity is adequate in the Einstein cluster in which this property is located, as outlined in his letter of dated April 3, 2009 (Attachment 9 to the staff report). Although Mr. Crispell mentions that the enrollment at the Rock View Elementary School is currently over capacity, a 13 classroom addition is scheduled to open in August 2011, which is very similar timing to the likely completion of the proposed development. Thus, there should be capacity at the same time that there is need for capacity generated by this proposal. 8/19/09 Tr. 56-57.

In Mr. Blumberg's opinion, the zoning application G-877 conforms to the goals and requirements of the existing sector plan, including the land use recommendation on the property, and with the purpose clause, the intent clause and the development standards and regulations in the RT-8 zone. The application will also be in the public interest, and internal vehicular and pedestrian circulation systems are adequate and efficient. 8/19/09 Tr. 58-59.

4. Curt Schreffler (8/19/09 Tr. 60-80):

Curt Schreffler testified as an expert in civil engineering. He surveyed the property in detail including boundaries, topographic tree and utility surveys, and he prepared the NRI/FSDs and a storm water management concept plan (SWMCP) for the property. The NRI/FSD has been approved by Technical Staff, and the SWMCP is under review by DPS. 8/19/09 Tr. 61-62.

The unique thing about this site is that the County is requiring control of both the ten year and hundred year storm events for quantity control. That's over and above their normal requirements, but, due to the watershed the site is in, and conditions a mile or two downstream, they're requiring these extra measures. So, the system to provide that control located in the northwest corner of the site, which topographically is the low point of the site. So, the majority of the site drains there naturally, and then will discharge to the established storm drain system in University Boulevard. There will also be quality control and recharge, which may consist of infiltration trenches, dry wells, coarse pavement and other similar smaller storm water management elements. DPS agreed to use of an underground concrete

system rather than an open pond on this particular site due to the close proximity to the neighborhood. The area above the underground system can be landscaped and become an amenity.

This system will avoid any adverse impacts on the neighborhood, and runoff towards the homes on the south should actually be reduced because the drainage divide will be moved further south, which will direct more flow from the site to the stormwater management facility on the north, near University Boulevard. This change is shown on Exhibit 84, which highlights the existing drainage divide in yellow, and the proposed drainage divide in blue, so that all the road surfaces and the fronts of the two single-family homes and all the townhouses on the site would drain to Applicant's facility. The rear of the two single family homes on the southwest of the site will drain into dry wells, so there will be no increase in runoff to the south. The Applicant is not required to control runoff from forested areas and lawn areas, because that is natural flow. 8/19/09 Tr. 64-66, 68-70, 75-81.

The site is in a well-developed area of the county, and the water, sewer, gas, electric about the site and are available for this proposed development. These public facilities are sufficient to accommodate the proposed development as shown on the revised schematic development plan. From a civil engineer perspective this project can certainly be designed and built with no adverse impact on the associated public facilities in this area. 8/19/09 Tr. 66, 68 and 71.

There are no dedication or right-of-way issues - Outlot B was platted in 2006, at which time land was dedicated for University Boulevard. In accordance with the master plan, no further dedication is required. 8/19/09 Tr. 67.

There is on-site forest which is classified as a moderate priority. But, there are no steep slopes, highly erodible soils, no streams and no wetlands or other sensitive environmental features on the site. It is not in a special protection area. A forest conservation plan will be required, but not at this stage. A noise evaluation will also be done. These items will be submitted in connection with subdivision, as per Technical Staff's recommendation. 8/19/09 Tr. 67, 71-73.

5. Michael Lenhart (8/19/09 Tr. 81-124):

Michael Lenhart testified as an expert in traffic engineering and transportation planning. Direct access to the site is solely via Findley Road extended from Drumm Avenue. Drumm and Findley are both 50 foot right-of-ways. Residents can access Findley Road via Drumm Avenue to Maryland 193, and from the south on Drumm Avenue via McComas Avenue and Plyers Mill Road. 8/19/09 Tr. 84-85.

Figure 18 of the sector plan (p. 96) is the proposed street and highway plan, and it shows on the extension of Findley Road, a proposed 50 foot right-of-way into the subject property with a cul-de-sac almost exactly as Applicant is showing on its plan. 8/19/09 Tr. 85.

Mr. Lenhart did a transportation analysis and a queuing analysis for this site. When a special exception or rezoning or preliminary plan is submitted, if the project is going to generate greater than 30 peak hour trips, then a local area transportation review or LATR is required. And, in order to conduct that traffic impact study, you have to have a scoping agreement with staff whereby there's a formula depending on the number of trips that are generated that dictate the number of intersections to be included in the study.

For the September 25, 2008 traffic study (Exhibit 21(a)) assuming 36 units, this site generated 30 trips, which was on the threshold of requiring a traffic study for LATR. The current application, with 27 units, generates only 23 evening peak hour and 15 morning peak hour trips as a maximum. Exhibit 43(d). Because it is less than 30 under the current application, an LATR traffic study is not required. The findings of both studies, the September 25, 2008 study and the updated study of March 18, 2009 (Exhibit 43(d)), found that all of the studied intersections were operating at critical lane volumes (CLV) of approximately 700 or less. Once the new trips are added in, the worst intersection operates at 701 CLV, well below the threshold for this policy area, which is a CLV of 1,600, according to Mr. Lenhart's final revised report of July 29, 2009 (Exhibit 85). Thus, even though an

LATR study is not required, this application would pass the review. 8/19/09 Tr. 86-92.

Under Policy Area Mobility Review (PAMR), a 10% mitigation of new trips would be required in this Wheaton-Glenmont policy area. Ten percent of 23 trips means that 2.3 trips must be mitigated. Technical Staff rounded that down to 2 trips and decided that the sites location near a Metro satisfied the 2 trip mitigation. 8/19/09 Tr. 97-100.

Included in Mr. Lenhart's final revised report (Exhibit 85) is a review of other possible residential developments to show that a commercial component would generate much more traffic than a residential development. An RT-8 development, as proposed, would generate roughly half the traffic of a mix of RT-6 and CT at this site. 8/19/09 Tr. 102-104.

Mr. Lenhart was able to walk from the site to the Metro in about 10 minutes, and it can easily be done within 15 minutes at a slow pace. A WMATA ridership survey found that developments such as this one, within 3,000 feet of a Metro, had about a 28% ridership. 8/19/09 Tr. 105-108.

Mr. Lenhart also did a queuing analysis of Drumm Avenue, approaching University Boulevard (MD 193) because of concerns raised by the community. Exhibit 43(d). He found that there was little or no delay at the intersection and that the maximum queue was two to three cars. The number of cars exiting the proposed development would be about one every five minutes, which would have no impact on the queue or the level of service of the intersection. 8/19/09 Tr. 109-111.

In the same report, Mr. Lenhart looked at the accidents reported at the Drumm Avenue/ MD 193 intersection, and he found that of the five accidents reported over three years (2005- 2007), only one involved a vehicle exiting Drumm Avenue. He concluded that there are no accident patterns or operational concerns at this location that would be evident based upon this information. In his opinion, the proposed rezoning will not adversely impact the surrounding area from the standpoint of traffic, and the proposed access to this site and on-site circulation, as reflected on the schematic development plan, are adequate and safe for both vehicles and pedestrians. This project is in very

close proximity to the Metro, with excellent pedestrian connections to the Metro via two separate routes. Based on the queuing report, the LATR study and the PAMR analysis, the project meets or exceeds all applicable guidelines and requirements, and is consistent with both the Growth Policy and the Sector Plan, regarding transportation. It is also compatible with the surrounding area in terms of traffic and transportation, in that it is an excellent transition from the mall use to the existing single-family homes, and does not place a burden on the roads or intersections. Parking will also be more than adequate 8/19/09 Tr. 111-118.

B. Government Witnesses

1. Khalid Afzal (7/31/09 Tr. 188-249):

Khalid Afzal testified that he is a team leader in the Community Based Planning Division of Technical Staff. He identified his memo of June 16, 2009, attachment 10 to Exhibit 58 in this case, which is the technical staff report. In that memo he found that the proposed application is not consistent with the existing master plan's recommendations. In his opinion, there is no reason that RT-6 would not work on this property.

M-NCPPC is in the process of updating the Wheaton Central Business District and Vicinity Sector Plan, and Technical Staff is still in the data gathering and analysis stage. His estimate is that the revised sector plan would be finally approved and adopted, "[p]robably sometime[] in spring to early summer time frame of 2011" (*i.e.*, two years from the hearing date). 7/31/09 Tr. 193. On cross-examination, Mr. Afzal indicated that following approval of a new sector plan or master plan, implementation via a sectional map amendment might take an additional few months, but he would still estimate the middle of 2011 for all that to be completed. 7/31/09 Tr. 204-207. Sectional map amendments may or may not include rezonings of properties recommended in the sector plan for a floating zone, depending upon the wishes of each property owner. 7/31/09 Tr. 245-246.

If Applicant wanted to build without a rezoning or even with a rezoning consistent with the

existing sector plan (*i.e.*, to RT-6), he would not have made a recommendation that it should hold until the new sector plan is approved. However, if the proposal is for a zone not recommended in the existing sector plan, and sector plan revisions are being considered, then Community Based Planning Staff would recommend awaiting the new sector plan, unless Applicant demonstrates that there have been significant changes in the sector plan area. In reaching this conclusion, he did not consider the other issues in this case – that the project may be compatible; that it was an RT zone, where master plan compliance is not a requirement; and that the existing sector plan was 19 years old plan. That is for Development Review Division or the Planning Board. 7/31/09 Tr. 197-201. Mr. Afzal did not consider the change in the Wheaton Mall access road or relocation of the Giant grocery store to be significant changes in the sector plan area. 7/31/09 Tr. 213-220.

Mr. Afzal further testified that commercial development is generally considered more intense than residential, but it's not always the case. One can't compare any commercial to any residential use to say one is more intense than the other. 7/31/09 Tr. 227. He indicated that, even if a proposed development might comport with some of the goals and objectives of the sector plan, those goals and objectives are crystallized in its specific zoning recommendation of RT-6, not RT-8. 7/31/09 Tr. 237.

2. Renée Miller (7/31/09 Tr. 249-256):

Renée Miller testified that she is an “AICP” (*i.e.*, certified by the American Institute of Certified Planners) and a senior planner in the Development Review Division of Technical Staff. She explained that Development Review Division is the project coordinator of local map amendments and special exceptions. They receive the application from the Hearing Examiner's office, and distribute the application to all of the agencies, of which there are about twelve. They piece together all of those comments received back using the zoning code and the standards in the code to arrive at a recommendation. The master plan is a piece, transportation comments are a piece, and all the pieces formulate Development Review Division's recommendation.

Ms. Miller agreed that the RT zone provisions do not require compliance with the applicable master plan and/or sector plan. Despite Mr. Afzal's recommendation to postpone action on this application until the sector plan review was completed, she recommended approval for a number of reasons. It is not a requirement that requested zone be explicitly consistent with the master plan in an RT application. Considering the goals of the sector plan, the fact that this plan is creating MPDUs, which is a housing policy goal; that there were no real transportation issues; and that the site, given the surrounding uses, is appropriate in density and for a transitional use, she felt that application sought an appropriate use for the site. MPDUs would not be required in an RT-6 development on this site.

C. The People's Counsel

Martin Klauber, Esquire, the People's Counsel, did not call any witnesses; however, he "adopt[ed] on behalf of the Office of the People's Counsel the same position that Ms. Savage just stated in Exhibit No. 82, not in opposition to the application." 8/19/09 Tr. 8-9.

D. Community Response

1. Karen Cordry (7/31/09 Tr. 257-296):

Karen Cordry initially testified in opposition to Applicant's proposal, but her opposition testimony, along with the opposition of all but one other opposition witnesses, was withdrawn when the hearing resumed on August 19, 2009. 8/19/09 Tr. 5-7 and Exhibit 82.

2. Donna Savage, Individually and on behalf of the Kensington Heights Citizens Association (8/19/09 Tr. 4-10; 141-142):

Donna Savage testified individually and on behalf of the Kensington Heights Citizens Association. She read a short statement (8/19/09 Tr. 6-7):

Based on an agreement between the applicant and the opposition regarding binding elements and other agreements with the community, the Kensington Heights Citizens Association and the Kensington Heights neighbors will not oppose this development going forward. This includes Molly Brunjes, Aaron Garnet, and Jerome Martin [*i.e.*, Mortman] who were here last time on July 31, as well as Karen Cordry who has already testified.

We withdraw our opposition to this rezoning application because of the unique opportunity to realize the input we've had in this case. We have earned concessions on the number of units, the placement of single-family homes, the design of triplex townhomes, pedestrian safety, visitor parking and a playground, . . . all of which you'll hear about later. All of which we would not have won if we had not fought.

We have made use of the 1990 Wheaton sector plan, the Montgomery County Code, many hours of our time and the time of county employees and elected representatives. The product of all that effort is this plan.

If the new sector plan were a distant possibility the situation would be different. If this applicant goes away, then the new sector plan will be in force in about two years and it will most likely recommend equal or greater density than what is proposed by the current applicant. However, we would be unable at that time to cash in on any of the effort we have expended in the last two plus years. We appreciate the opportunity to work together with the applicant to maximize the quality of this addition to our community, Kensington Heights. . . .

At the end of the hearing, Ms. Savage reiterated her position that “the Kensington Heights Citizens Association has withdrawn its opposition, and that this withdrawal is the current and final community view [of Kensington Heights].” 8/19/09 Tr. 141-142.

3. Virginia Sheard (8/19/09 Tr. 125-138):

Virginia Sheard testified that she lives in lives in the Kensington View community. She was not able to testify on behalf of the Kensington View Civic Association because there was no signed letter in the file on behalf of the Association, as required by OZAH rules, so she testified as an individual.] 8/19/09 Tr. 125-128.

Ms. Sheard stated that she is the chair of the land use and zoning committee which has hosted the sector plan revision work group for about 18 months. Participants include many of the other residential communities surrounding the sector plan area. This group is now part of the ad hoc sector plan work group of the Wheaton Redevelopment Office. She participated in the charette on this case and in several of the discussions with Mr. Mehring and other of the Kensington Heights work group, sharing her personal experiences on issues and assisting in locating other information resources based

on her experience.

Ms. Sheard supports the community-based planning division recommendation of denial based on the fact that the current sector plan recommends two viable alternatives for the development of this property, either the RT-6 or the R-60. She felt the C-T zone was “off the table” since the Applicant chose to submit a residential application rather than the CT application.

The main purpose of her testimony is that because the sector plan revision process is so “far along” that this should either be developed under the current sector plan recommendations or should be developed under whatever the approved and adopted sector plan recommendations are when it is finalized because she believes in the process of the sector plan creation. 8/19/09 Tr. 129-130.

One of her concerns is that this has been characterized as a reasonable transition from the existing residential neighborhood to the Metro, for instance. That's an unknown because we don't know what is going to happen on the other side of the ring road or on the other side of this property. So, we don't know whether the RT-8 or R-12 or any other thing would be an appropriate transition or buffer between these two things. It may very well be in the new sector plan that winds up being adopted and approved by the Council that RT-8 or higher would be on this site. But it's unknown at this time what the shape of the surrounding area will be.

Ms. Sheard feels that the current sector plan permits either RT-6 or C-T as options, and of those two, the RT-6 would be appropriate. 8/19/09 Tr. 130-132.

V. ZONING ISSUES

Zoning involves two basic types of classifications, Euclidean zones and floating zones. The term “Euclidean” zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and specific regulations governing aspects of land development, such as permitted uses, lot sizes,

setbacks, and building height.

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating to the Council that the proposed development will be consistent with the purpose and regulations of the proposed zone and compatible with the surrounding development, as required by the case law, *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967), and that it will be consistent with a coordinated and systematic development of the regional district and in the public interest, as required by the *Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28)*, Md. Code Ann., § 7-110.

Montgomery County has many floating zones, including the R-T Zones. The RT-8 Zone contains development standards and a post-zoning review process that generally delegate to the Planning Board the details of site specific issues such as building location, stormwater control, vehicular and pedestrian routes, landscaping and screening. The Council has a broader and more discretionary role in determining whether to approve a rezoning.

As mentioned in Part III.G. of this report (pp. 27-32), compliance with Sector Plan recommendations is not mandatory in this case because the R-T Zones do not require it; rather, the courts have held that the Master Plan or Sector Plan should be treated only as a guide in rezoning cases like this one. As stated in *Trail v. Terrapin Run*, 403 Md. 523, 527, 943 A.2d 1192, 1195 (2008),

We also acknowledge our statement in *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 530, 814 A.2d 469, 478 (2002) (citing *Richmarr*, 117 Md. App. at 635-51, 701 A.2d at 893-901, [1997] that:

We repeatedly have noted that [master] plans, which are the result of work done by planning commissions and adopted by ultimate zoning bodies, are advisory in nature and have no force of law absent statutes or local ordinances

linking planning and zoning. Where the latter exist, however, they serve to elevate the status of comprehensive plans to the level of true regulatory device.⁹

We return now to the three areas of Council review discussed above, the purpose and requirements of the zone, compatibility with land uses in the surrounding area, and relationship to the public interest.

A. The Purpose and Requirements of the Zone

The intent and purpose of the R-T Zones, as stated in Code §59-C-1.721, are set forth below.

The purpose of the R-T Zone is to provide suitable sites for townhouses:

- (a) In sections of the County that are designated or appropriate for residential development at densities allowed in the R-T Zones; or*
- (b) In locations in the County where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.*

It is the intent of the R-T Zones to provide the maximum amount of freedom possible in the design of townhouses and their grouping and layout within the areas classified in that zone, to provide in such developments the amenities normally associated with less dense zoning categories, to permit the greatest possible amount of freedom in types of ownership of townhouses and townhouse developments, to prevent detrimental effects to the use or development of adjacent properties in the neighborhood and to promote the health, safety, morals and welfare of the present and future inhabitants of the district and the County as a whole. The fact that an application for R-T zoning complies with all specific requirements and purposes set forth herein shall not be deemed to create a presumption that the resulting development would be compatible with surrounding land uses and, in itself shall not be sufficient to require the granting of the application.

As is evident from the statutory language, the R-T Zone may be applied (1) in areas that are designated for R-T Zone densities (implying a master plan designation); (2) in areas that are

⁹ Because the proposed RT-8 Zone does not require conformance with the Sector Plan., this case is not affected by legislation aimed at modifying *Terrapin Run*'s interpretation of the word, "conform."

appropriate for residential development at densities that are allowed in the R-T Zones; or (3) where there is a need for buffer or transitional uses.

The relevant Master Plan did not designate the subject site for the RT-8 Zone, and thus the Purpose Clause cannot be satisfied under that criterion.¹⁰ However, there are three alternative methods of satisfying the Purpose Clause, and an Applicant is required to satisfy only one of them.

Accordingly, the Purpose Clause may also be satisfied by development in areas “*appropriate for residential development at densities allowed in the R-T Zones*” or in areas “*where there is a need for buffer or transitional uses between commercial, industrial, or high-density apartment uses and low-density one-family uses.*”

The evidence in this case supports Applicant’s contention that the subject site satisfies both the “appropriateness” and the “transitional” criteria. In this regard, Technical Staff stated (Exhibit 58, p. 6):

The subject site is specifically identified in the sector plan as a suitable location for townhouse development at six dwelling units per acre. Although the application is not in strict conformance with the sector plan density recommendation, it satisfies the purposes of the zone. The site is appropriate for townhouse development at densities permitted in the RT-8 zone and provides an appropriate transitional land use from the Wheaton Shopping Center to the adjacent one-family detached residential development.

Applicant’s land use planner, Al Blumberg, was more expansive. He testified that the proposed density would be compatible with the existing density of the area. The proposed development does not propose the full density which could be achieved under the RT-8 Zone with MPDUs. Rather, Applicant proposes a density of 8.94 dwelling units to the acre, which is the midpoint between the RT-6 and the RT-8 maximum densities, with MPDUs, since the RT-6 Zone’s maximum is 7.32, and RT-8 Zone’s maximum is 9.76. 7/31/09 Tr. 175-179.

¹⁰ As discussed in Part III. G of this report, Applicant argues that the Sector Plan did designate this site for development in the R-T Zones, just at a different density. For the reasons discussed in that section, the Hearing Examiner finds that the designation, which included a recommendation for part of the site to be classified in the C-T Zone, is not sufficient to satisfy the first alternative of the purpose clause.

Mr. Blumberg examined the record plats of the lots in the block surrounded by Drumm Avenue, Faulkner Place, the shopping center, and University Boulevard. The acreage of those 24 lots is 3.95 acres, which results in a current density of 6.08 units per acre. If you combine the existing, surrounding lots' density with the density Applicant proposes on the subject site, that ends up with a combined density of 7.17 units per acre, which is slightly lower than the maximum density of 7.32 with MPDUs in the RT-6 zone. Mr. Blumberg therefore concluded that the proposed RT-8 density is appropriate for the subject site. It is also an appropriate location for townhouses, because the location is surrounded by major roads, University Boulevard and the access road to the Wheaton Mall, with commercial zoning on one side, and low density residential, single-family detached residential surrounding to the other sides. 8/19/09 Tr. 42-43.

Mr. Blumberg opined that this is also an appropriate and compatible location for townhomes in the community, both for reasons of smart growth, and for the physical relationships. Applicant proposes to have sidewalks leading from the public sidewalks to the units and also to University Boulevard and into the Wheaton Mall property.

The second alternative purpose of the zone is that the development be suitable for townhouses in a location where there is a need for a buffer or transitional uses between commercial, industrial or high density apartment uses, and low density one-family uses. In Mr. Blumberg's opinion, this development meets that standard precisely, in that the site is between the C-2 and C-T zones on one side, and the low density residential zones on the other, so there would be a transition or buffer between those two uses. 8/19/09 Tr. 43-44. By providing the densest area closest to the commercial areas to the east, the development serves as a transition to the single-family, detached, R-60 lots to the west. 7/31/09 Tr. 175-181.

The Hearing Examiner agrees with both Technical Staff and Mr. Blumberg. The subject development, at the proposed density of 8.94 dwelling units per acre, is clearly appropriate for the

area, and the townhouses to be located in the northern and eastern parts of the development will serve as a transitional buffer for the existing single-family detached homes. The purpose clause for the RT-8 Zone is therefore satisfied.

The intent clause of for the R-T Zones will also be fulfilled. Mr. Blumberg opined that the application meets the intent of the R-T Zones because it allows the maximum freedom possible in the design of townhouses and the grouping and layout. Also, by designing the townhouse units in rows of three and four, as opposed to the eight-per-row design that is permitted in the zone, Applicant will provide compatibility with the community and a good design, as well.

The proposal would provide the development with amenities normally associated with less dense zoning categories, such as open space, a small sitting area, sidewalks and connectivity. 8/19/09 Tr. 45-46. The stormwater management facility will be under ground, so it will provide additional open space, covered with grass. 7/31/09 Tr. 162-168.

Another intent of the zone is to prevent detrimental effects to the use or development of adjacent properties or the neighborhood. By limiting the access to Findley Road and creating the cul-de-sac and turnaround, this development will become a part of the overall community, which will prevent any kind of detrimental effect on use or development of adjoining properties. Likewise, it will promote the health, safety, morals and welfare of the present and future inhabitants of the district by providing a connecting sidewalk system which will improve walkability in proximity to Metro. 8/19/09 Tr. 44-46.

In sum, the Hearing Examiner finds that the proposed development also satisfies the stated intent of the RT-8 Zone.

Applicant's proposal also meets and even exceeds all the development standards and special regulations of the RT-8 Zone, as demonstrated in Part III. F. of this report. Most significantly, the maximum amount of building coverage is specified in the Zoning Ordinance as 40 percent in the RT-

8 Zone when MPDUs are provided, and Applicant is binding itself to no more than 25 percent building coverage, considerably less than the maximum permitted. In the same way, the Zoning Ordinance specifies a minimum of 45 percent green area when MPDUs are provided, and Applicant is proposing a binding element to provide to no less than 55 percent green area. 8/19/09 Tr. 46-47.

In sum, the subject application meets the purpose and requirements of the RT-8 Zone.

B. Compatibility

An application for a floating zone reclassification must be evaluated for compatibility with land uses in the surrounding area. For the reasons discussed in the preceding section, Applicant has demonstrated compatibility with the surrounding area. Technical Staff agrees (Exhibit 58, pp. 6-7):

If the subject site were developed with townhouses under the RT-6 zone, as recommended in the sector plan, the overall density of the block would not be increased. Development of the site as proposed by the applicant under the RT-8 zone would increase the overall density of the block by about 1.3 dwelling units per acre . . . The difference in density between the RT-6 and RT-8 zones is not a substantial increase for the block. Based in part on this density analysis, staff concludes that development of the site under the RT-8 zone would be compatible with development elsewhere in the block.

In addition, the site is located immediately adjacent to the service road of a major retail shopping center and fronts on a major roadway with a 120-foot right-of-way and six travel lanes. The site is also within ½-mile of the Wheaton Metro Station, 1/3-mile of the Central Business District, and is served by multiple bus routes.

The applicant is proposing townhouses that are in groups of 3-4 attached units, which will look similar to a larger single-family detached home. The heights of the townhouses will also be consistent with single family-detached homes and be no taller than 35-feet; however, in most instances, the homes will be less than 30-feet. (See Attachment 6.) According to plans submitted by the applicant, the nearest townhouse will be approximately 145-feet from the side of the adjacent house.

The lots for the detached homes are similar in size to the adjacent lots along Findley Street. Final layout of the townhouses and single-family detached lots will be determined at site plan.

As discussed at length in Part III. J. of this report, the Applicant has also gone a long way towards alleviating the concerns about compatibility raised by the community, and almost all have

withdrawn their opposition.

Based on this record, the Hearing Examiner agrees with the findings made by Technical Staff that the proposed reclassification to the RT-8 Zone and the proposed development would be compatible with development in the surrounding area.

C. Public Interest

The Applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.”
[Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

When evaluating the public interest, the District Council normally considers Master Plan or Sector Plan conformity, the recommendations of the Planning Board and Technical Staff, any adverse impact on public facilities or the environment, and factors such as the inclusion of MPDUs and location near public transportation, especially a Metro station.

The Sector Plan and the recommendations of the Planning Board and Technical Staff were considered, at length, in Part III.G., and Parts V. A. and B., of this report. The Sector Plan does not specifically recommend the zoning change sought by Applicant, but the requested rezoning is consistent with its objectives and general language. The Development Review Division of Technical Staff supports the proposed rezoning, believing that the development will be compatible with surrounding uses and compliant with the purposes and standards of the RT-8 Zone. The Planning Board did not examine compatibility issues because it addressed only the question of Sector Plan conformity. It therefore voted, 2 to 1, to deny the application, so that the area can be rezoned in

accordance with a revised Sector Plan (Exhibit 60). The Hearing Examiner rejected that position because the record in this case establishes that the new Sector Plan will likely not be available for two years, and Applicant's present application proposes a development which would be in the public interest now.

The impact on public facilities was discussed in Part. III. H. of this report. The evidence indicates that, although the local elementary school experiences some overcrowding, an addition is scheduled to open in the same general time frame that the proposed development would be completed. Moreover, "[t]he current growth policy school test (FY 2009) finds capacity adequate in the Einstein Cluster." *See* April 3, 2009 letter from Bruce H. Crispell, the Director of Long-range Planning for the Montgomery County Public Schools (Attachment 9 to the Technical Staff report, Exhibit 58). Given Mr. Crispell's conclusion and the plan for added capacity for elementary school students, the Hearing Examiner finds that there is sufficient school capacity for the proposed development.

The evidence also supports the conclusion that the impact on local traffic from this development would be minimal and will clearly meet LATR and PAMR standards. Evidence was also presented that the proposed development would have no adverse effect on utilities or other public services.

The potential for any adverse environmental impact was discussed in Part III. I. of this report. As noted there, the site is not in a special protection area, and a forest conservation plan will be required at subdivision to preserve on-site forest, to the extent possible. A stormwater management concept plan has been submitted to DPS, and it will be reviewed at subdivision. Neither Technical Staff nor the Planning Board noted any adverse effect on the environment, nor is there any other such evidence of record.

Significantly, the proposed development would provide four MPDUs and would be a walkable, smart-growth project. One of Applicant's partners, Chris McGoff, described the reasons why Applicant's proposal is, in fact, a smart-growth project (7/31/09 Tr. 54-56):

1. The property provides a wide range of transportation alternatives to its residents;
2. It creates a walkable neighborhood;
3. It promotes Metro ridership;
4. It creates a range of housing opportunities;
5. It is compatible and complimentary to the existing community;
6. It creates a safer walking path for the existing community to essential services; and
7. It extends the existing community.

Mr. Blumberg expanded on that list. The proposal meets the Growth Policy recommendations for providing housing adjacent to retail as well as to Metro, thereby encouraging utilization of these public facilities; the infrastructure of roads and water and sewer is already in place for this proposed development; it provides a transition between the Wheaton Mall and the access road into the Wheaton Mall to the existing R-60 residential neighborhood to the west; it is both an appropriate and a compatible location for the proposed development; it eliminates the threat to the community of the C-T Zone; it is in the public interest to preserve a residential neighborhood, rather than create a further extension of the commercial development in the vicinity; and this modest increase in density in exchange for the deletion of the additional commercial is a reasonable and appropriate request. 8/19/09 Tr. 52-54.

It is the Hearing Examiner's conclusion that this case presents a great example of an informed community working together with a flexible developer to arrive at an excellent proposal, which minimizes adverse impacts on the community, provides a buffer from commercial development for the nearby single-family detached homes, produces MPDUs and establishes a walkable community with easy and quick pedestrian access to Metro and the nearby shopping mall.

For all of these reasons, as more fully discussed in Parts III. G., H., I., and J. of this report, the Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed

reclassification and development would have no adverse effects on public facilities or the environment, and that approval of the requested zoning reclassification would be in the public interest.

VI. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I reach the following conclusions:

1. The application has satisfied the requirements of the RT-8 Zone and its Purpose Clause;
2. The application proposes a form of development that would be compatible with land uses in the surrounding area; and
3. The requested reclassification to the RT-8 Zone has been shown to be in the public interest.

VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-877, requesting reclassification from the R-60 and C-T Zones to the RT-8 Zone of 3.0157144 acres (131,364.52 square feet) of land known as Outlot "B," Kensington Heights and located at West University Boulevard and Findley Road, in Kensington, Maryland, be **approved** in the amount requested and subject to the specifications and requirements of the revised Schematic Development Plan, Exhibit 95(a); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan approved by the District Council within 10 days of approval, in accordance with §59-D-1.64 of the Zoning Ordinance and that the revised Declaration of Covenants (Exhibit 95(b)) is filed in the County land records in accordance with § 59-H-2.54 of the Zoning Ordinance.¹¹

¹¹ The Hearing Examiner believes that, pursuant to Zoning Ordinance §59-H-8.2(b), a six-member majority of the Council will be required to approve this application because the RT-8 classification is not recommended by the Sector

Dated: October 20, 2009

Respectfully submitted,

Martin L. Grossman
Hearing Examiner

Plan, and the Planning Board did not recommend approval. §59-H-8.2(b) provides:

(b)A resolution granting a classification that is not recommended for the subject property by an approved and adopted master or sector plan or functional master plan requires the affirmative vote of 6 members of the district council. However, if the Planning Board recommends approval of the classification, the resolution requires the affirmative vote of only 5 members.

Applicant argues that since the Sector Plan recommends an RT Zone (RT-6) for the majority of the property (albeit not the RT-8 classification sought by Applicant) and CT zoning only for a small remainder, a 5-member affirmative vote of the District Council is all that is required for approval of a rezoning of the entire site to the RT-8 Zone. *Applicant's Closing Argument (Exhibit 87(a))*. While one could argue, as Applicant does, that "RT" is the zoning classification and "8" is the density category (7/31/09 Tr. 13-14), the Hearing Examiner does not believe that such an interpretation would reflect the Council's intent in framing this section. To so find would mean that a six-member majority would not be needed if the Master Plan and the Planning Board recommended RT-6 and an applicant proposed RT-15, even though those two classifications would result in radically different developments. Moreover, in this case, Applicant's argument does not resolve the fact that the Sector Plan also included a CT Zone recommendation for part of the site, clearly a different Zoning Classification.